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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

BARNEY R. COLSON, ET AL,

Petitioners,

v.

WALTER J. HICKEL, Secretary of the Interior,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Barney R. Colson, et al., pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on June 16, 1970. Petition for rehearing and suggestion for rehearing En Banc was denied August 17, 1970.

OPINIONS BELOW

The Opinion of the Court of Appeals (Appendices A-B) is reported at 428 F. 2d 1046. The Decision of the United States District Court for the Middle District of Florida is reported at 278 F. Supp. 826 (Appendices E-F). The Decision of the Secretary of the Interior is reported at 70 I.D. 409 (Appendix G).

JURISDICTION

Judgment of affirmance was entered by the Court below on June 16, 1970. A Petition for rehearing and, alternatively, Suggestion for Rehearing En Banc, was denied by Order of August 17, 1970. The jurisdiction of this Court is invoked under 28 USC §1254(1). This case involves a federal question as to rights protected by Amendment V to the Constitution of the United States (Appendix K) which were granted by the Act of July 17, 1854 (10 Stat. 304) (Appendix I) and the Act of August 31, 1964 (78 Stat. 751) (Appendix H).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Courts of the United States have jurisdiction to review an administrative decision of the Secretary of the Interior under the review provisions of the Administrative Procedure Act. (5 U.S.C. 701-706)

2. Whether the Secretary of the Interior has authority superior to the protections embodied in the Fifth Amendment of the United States Constitution which prohibit the taking of property without due process and just compensation. (United States Constitution, Amendment V)

3. Whether the doctrine of sovereign immunity bars the Courts of the United States from judicially reviewing an administrative decision of the Secretary of the Interior which rejects Congressionally granted vested land rights. (Acts of July 17, 1854 (10 Stat. 304) and August 31, 1964. (78 Stat. 751))

CONSTITUTIONAL PROVISIONS AND STATUTES

Pertinent to the Court's consideration of this case are the following constitutional provisions and statutes which the case involves:

1. Article V of the Constitution of the United States. (Appendix K)

2. The Act of July 17, 1854, 10 Stat. 304. (Appendix I)

3. The Act of August 31, 1964, 78 Stat. 751, Public Law 88-545. (Appendix H)

4. Judicial Review provisions of the Administrative Procedure Act, Title 5, Chapter 7, Sections 701-706, 5 U.S.C. 701-706. (Appendix L)

STATEMENT OF THE CASE

This suit was instituted to obtain judicial review of a decision of the Secretary of the Interior made in the course of his administering mandatory public land laws, which decision was adverse to and destructive of statutory property rights granted by Congress in enacting the same public land laws. There is no dispute as to the facts.

This case contemplates only the consummation of a long unsatisfied right to receive vacant public land which the United States granted and initially evidenced by two pieces of scrip issued under the Act of July 17, 1854, (10 Stat. 304) (Appendix I) in exchange for lands previously granted to the Sioux Indians by Article 9 of the Treaty of Prairie du Chien which was concluded on July 15, 1830, 7 Stat. 328.

The United States again recognized these rights as unpaid sovereign obligations when it enacted the Scrip Recordation Act of August 5, 1955 (69 Stat. 534) and provided an additional money and land settlement authorization to satisfy claims

arising out of scrip, lieu selection, and similar rights by enacting Public Law 88-545, August 31, 1964 (78 Stat. 751) (Appendix H).

The Interior Department in its *Kean* decision D-29200 of April 29, 1914 (Appendix J) affirmatively granted to Kean the right to "govern the use" of the scrip so that it could be used to apply for and receive public land in substitution for land originally patented in satisfaction of one of the rights authorized by the Act of July 17, 1854. That decision was reached by Interior when the original patents were declared void in *Kean v. Calumet Canal and Improvement Company*, 190 U.S. 452, 23 S.Ct. 651, 47 L.Ed. 1134 (1903), because the title to the lands, which consisted of a dried up lake bed, had passed to the riparian owners and, as a result, had not become property of the United States so as to be subject to patent by it. Kean conveyed all her rights to Colson and she is Petitioner's immediate predecessor in interest with respect to one of his land rights for 160 acres. Kean's rights originated in Sioux Half-Breed Scrip Certificate 398 D issued to Anthony Renville under the Act of July 17, 1854 and which Kean had exchanged for the land patent which was subsequently declared void.

Petitioner Colson's other land right for 80 acres originated in Sioux Half-Breed Scrip Certificate 379-C issued to Ellen Angie under the Act of July 17, 1854, was conveyed by her to one Jesse L. Linn on February 21, 1910, and conveyed by him to Petitioner Colson on December 26, 1914. On May 19, 1915, Ellen Angie also confirmed the conveyance of all her rights to the same land claim to Petitioner Colson by Quit Claim Deed.

Petitioner Colson, pursuant to instructions he received from the Interior Department, which is charged with administering the public land laws, applied for patents to specified parcels of land in satisfaction of his rights to public land. Colson's documents contained broad powers as well as specific powers, including the right to enter and take possession of the subject land, and generally authorized him to do all that was necessary to perfect the land exchange transactions. The Secretary of

Interior denied the applications[1] on the basis that the authorizations presented in support of the application, although valid and not previously exercised and complete in all other respects, did not contain the words "select and locate." The Secretary never stated why such words were necessary nor did he indicate their meaning or in what manner the documents were deficient for lack of them. No authority was cited for the proposition adopted by the Secretary in his decision of September 16, 1963. (Appendix G.)[2]

The suit filed in the United States District Court for the Middle District of Florida for judicial review of the Secretary's decision prayed that the Secretary's decision be reviewed under the Administrative Procedure Act to determine whether his decision was correct as a matter of law. If that decision was not correct, it was prayed that the Secretary be directed to perform the obligations imposed upon him by the Act of July 17, 1854 and the Taylor Grazing Act, 48 Stat. 1269, 43 U.S.C. 315(f), or to make money settlement with Petitioner in accord with the Act of August 31, 1964, in satisfaction of his land rights, the satisfaction of which has been made obligatory upon the United States by the United States Constitution, the Congressional Acts of July 17, 1854 and August 31, 1964, and Interior's *Kean* decision of April 29, 1914.

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[1]The application was initially approved by the Bureau of Land Management as to some of the land specified but was rejected as to other land solely on the basis that the land was not available. The land availability issue was then appealed and on that appeal the Sectetary of the Interior rejected the application, not because of the land availability question, but on the basis of an erroneous legal interpretation of Colson's authority contained in his documents. It was subsequently stipulated in District Court that the lands applied for are vacant public domain and have been offered to others because they are vacant public domain.

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[2]The Secretary's error was that he failed to recognize the vast body of case law as subsequently briefed by Colson to the Fifth Circuit which together with the rule of *Midway v. Eaton*, 183 U.S. 602, 22 S.Ct. 261, 43 L.Ed. 347 (1902) establishes the nature of Colson's documents as conveyances of the underlying land rights. The Fifth Circuit correctly recognized Colson's documents as conveyances of land rights.

It was stipulated in District Court that the land claimed is vacant public domain, subject to the Taylor Grazing Act, suitable for Petitioner's claim, that Petitioner's application is a priority selection of the land under the Taylor Grazing Act, that Petitioner's documents are valid and have not been used to acquire public land, that Petitioner is the owner for valuable consideration and for his benefit of the rights represented by his documents, that Public Law 88-545 authorizes the elective rights of a valid claim holder to receive either land or money, that Petitioner's rights authorize exclusive management and/or sale and full control and use of land claimed in satisfaction of these claims, and that there are no parties or claimants adverse to Petitioner as to either the land claimed or these rights to claim land.

The District Court denied the Motion to Dismiss filed by the Secretary which, among other things, urged that the Court lacked jurisdiction because the suit was against the United States. The motion to dismiss was heard on the merits and hence was treated as a motion for summary judgment under Rule 12(b), F.R.C.P. This determination by the District Court that it had jurisdiction of this suit should have been the rule of the case governing the prosecution of it thereafter. *Sunshine Publishing Company v. Summerfield*, 184 F.Supp. 767 (1960). However, in its final decision, the District Court reversed itself without notice and decided the question of jurisdiction contrary to its own prior ruling. Subsequently, that point, lack of jurisdiction because of sovereign immunity, became the sole basis for affirmance by the Court of Appeals of the District Court decision.

The District Court did not address the question placed before it for judicial review of whether the Secretary's decision denying Petitioner's application and the basis for it was contrary to law and therefore wrongfully destructive of

Petitioner's property interests in his land rights.[3] The District Court, citing no authority whatsoever and without stating any supporting rationale, concluded as a matter of law that the action was a suit against the United States, and since it had not consented to be sued, the doctrine of sovereign immunity applied to preclude suit. Other conclusions of law expressed by the District Court, some of which were also denied by its prior rejection of the Secretary's Motion to Dismiss, are not judicially established in view of its conclusion that it lacked jurisdiction to review the administrative decision of the Secretary of the Interior.[4] (Appendices E-F.) Petitioner appealed the case to the United States Court of Appeals for the Fifth Circuit.

The Court of Appeals recognized in its opinion that Petitioner's documented authorizations supporting his land rights are conveyances of the land approved for that purpose as unequivocally settled by the Supreme Court in *Midway v. Eaton*, 183 U.S. 602, 22 S.Ct. 261, 43 L.Ed. 347 (1902) and traced their chain of title to Petitioner. (Appendices A-B).

The appellate court also recognized in its opinion that the Interior Department in its *Kean* decision determined that Anna R. Kean, Petitioner's immediate predecessor in interest, should be permitted to govern the use of the scrip for purposes of making a new selection of public land.

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[3]Instead of addressing itself to the legal point of the Secretary's decision placed squarely before the Court by stipulation as to whether the words "select and locate" were necessary to complete Colson's powers, the Court, over the objection of Colson, went off on a myriad of other matters raised as *post hoc* rationalizations by counsel for the Secretary to otherwise justify his decision, contrary to the principle that administrative orders must stand on their own recitals. *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168-169, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962); *Alaska Steamship Co. v. Federal Maritime Commission*, 344 F. 2d 810, 815-816, 9th Cir. (1965); *Pacific Power and Light Co. v. Federal Power Commission*, 333 F.2d 689, 696, 9th Cir. (1964); *Cable TV of Santa Barbara, Inc. v. FCC*, 428 F.2d 672, 9th Cir. (1970).

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[4]The District Court's other conclusions were all outside the question presented to it on appeal from the Secretary.

Nevertheless, the Court of Appeals affirmed dismissal of the suit by the District Court on the sole basis that the suit was against the United States over which the court held it lacked jurisdiction because of the absence of consent to be sued. In so doing, the appellate court relied on its prior decisions in *Simons v. Vinson*, 394 F.2d 732, 5 Cir., 1968, and *Gardner v. Harris*, 391 F.2d 885, 5 Cir., 1968, which dismissed suits that had been initiated to determine title, ejectment, and to abate nuisances, such dismissals being based on the ground that the suits there would operate against the public domain or require action by a government official outside of his statutory powers.[5]

The appellate court denied Colson's Petition for Rehearing on August 17, 1970 (Appendix C) and granted a Further Stay of Mandate to and including November 15, 1970 (Appendix D).

Federal jurisdiction of Petitioner's suit in the court of first instance was based upon the right to judicial review founded in the Administrative Procedure Act, 5 U.S.C. 701, *et seq*, (Appendix L), the fact that the case arises under the Constitution and Laws of the United States and involves a matter in controversy having a value in excess of $10,000.00, jurisdiction for which is granted to the District Court by 28 U.S.C. 1331, the fact that the administrative decision in the matter is not committed to or involve agency discretion, the fact that no statute forbids such review, the fact that the administrative decision represents a taking of property by the federal government without just compensation in violation of the Fifth Amendment and the due process requirements of the United States Constitution, the fact that the affirmative and explicit

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[5] The *Simons* and *Gardner* cases were not suits for judicial review of federal agency action. In making the *Simons* and *Gardner* decisions, the appellate court had relied upon the decisions concerning the doctrine of sovereign immunity handed down by the United States Supreme Court in *Malone v. Bowdoin*, 369 U.S. 643, 82 S.Ct. 980, 8 L.Ed.2d 168 (1962); *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 115 (1963); and *Larson v. Domestic and Foreign Commerce Corporation*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1928 (1949), all of which were original actions and not the result of an administrative procedure and an appeal therefrom.

allegations of Petitioner's suit when accepted at face value and given their natural jurisdictional consequences demonstrate a case to compel the Secretary to perform a clear legal duty. *(Carter v. Seamans*, 411 F.2d 767, 5th Cir. (1969)), and the fact that authority for judicial review under the facts and circumstances of the matter was established by *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *Harmon v. Brucker*, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed. 503 (1958); and *Adams v. Witmer*, 271 F.2d 29, 9th Cir. (1958). Additionally, Colson has no remedy other than this suit.

The Court of Appeals, prior to issuing its decision in this case, informed the parties that it would await a determination by this Court in the event certiorari was sought by the government in the case of *State of Washington v. Udall*, 417 F.2d 1310, 1322, 9th Cir. (1969). (Appendix M). Certiorari was not requested by the government and in its decision here the Fifth Circuit specifically acknowledged its awareness of the decision in the State of Washington case at footnote / of its Decision. (Appendix A-7).

REASONS FOR GRANTING THE WRIT

I

The Fifth Circuit, Contrary To Other Circuits, Has Erroneously Determined In This Case That The Doctrine of Sovereign Immunity Prohibits Judicial Review of An Administrative Decision By The Secretary Of The Interior Rejecting Vested Rights Granted By Congress Under The Public Land Laws.

The United States Court of Appeals for the Fifth Circuit affirmed a decision of the United States District Court for the Middle District of Florida which dismissed an appeal from a decision by the Secretary of the Interior on the basis that it had no jurisdiction because the suit was against the United States to which it had not given its consent.

The Fifth Circuit recognized and acknowledged that its decision in the instant case was in conflict with the decision of the Ninth Circuit Court of Appeals in the case of *State of Washington v. Udall*, 417 Fed.2d 1310, 1322, 9th Cir. (1969).[6] The Fifth Circuit stated that prior decisions of that Court, relying upon decisions of the United States Supreme Court, required it to hold that judicial review and jurisdiction in this case was banned by the doctrine of sovereign immunity because, in the opinion of the Fifth Circuit, the suit would operate against the public domain.

This decision, if allowed to stand, necessarily means that no decisions by the Secretary of the Interior which are adverse to vested and mandatory rights granted by public land laws are subject to review since such actions, by their very nature, involve the public domain. Thus, this case presents the important issue of whether or not administrative decisions of the Secretary of the Interior rejecting vested rights granted by the Congress under the public land laws are subject to judicial review.

The decision below is contrary to decisions of this Court with respect to the judicial review provisions of the Administrative Procedure Act. Further, it relies on inapposite decisions of this Court as well as inapposite decisions in the Fifth Circuit to reach a conclusion that no administrative decisions of the Secretary relative to public land laws are subject to judicial review. Its decision is contrary to decisions in other Circuits which have determined that administrative decisions of the Secretary under the public land laws are subject to judicial review.

The Secretary's adverse decision in this case was limited to a determination that because Colson's credentials did not contain

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[6]The Fifth Circuit, recognizing the importance of the *State of Washington* case, withheld its decision in this case "pending disposition of certiorari" and did not issue its decision here until after being advised that the government would not seek certiorari. (Appendix M).

the words "select and locate" he could not prosecute his application to receive land in satisfaction of his land rights which originated in the grant of the Act of July 17, 1854, one of which rights was additionally confirmed by the 1914 *Kean* decision D-29200 of the Interior Department.[7] The adverse Interior decision in the instant case was based solely on an erroneous judicial interpretation by the Secretary with respect to the legal rights described in Petitioner's documents. The decision did not in any way involve the exercise of discretion by the Secretary. Any discretion the Secretary might have is not whether to honor the application (since that is a matter required by law under the grant of the 1854 Act and the decision of this Court in *Midway v. Eaton, supra*), but only whether the lands applied for are appropriate for scrip selection pursuant to the requirements of the Taylor Grazing Act. However, the Secretary never reached the question of whether the land applied for was appropriate to the application so that patents should issue. Indeed, the Secretary specifically refused to rule on that matter. Thus, the adverse decision of the Secretary was based on legal error in an area of law wherein he is not permitted to act only as he sees fit.

The Administrative Procedure Act provides for judicial review. (Chapter 7, Title 5, United States Code, Appendix L). It applies to agency actions except where (1) a statute precludes judicial review, or (2) agency action is committed to agency discretion by law. As noted above, the matter of agency discretion is not present in this case since the point at which the Secretary would be authorized to exercise an area of discretion was never reached, i.e., his functions under Section 7 of the Taylor Grazing Act, 43 U.S.C. 315(f), to classify land in response to an application for the land.

In spite of the clear language of the Administrative Procedure Act and the recognized fact that the adverse action by the

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[7]That Interior decision resulted from the decision of this Court in the case of *Kean v. Calumet Canal and Improvement Company*, 190 U.S. 452, 23 S.Ct. 651, 47 L.Ed. 1134 (1903).

Secretary was taken in his administration of the public land laws, the Court below nevertheless determined, contrary to extensive judicial decisions to the contrary in other circuit courts, that legal errors are not judicially correctable. This was because the doctrine of sovereign immunity was held to apply and therefore the Court below was powerless to review an action of the Secretary, even though legally wrong unless it could be demonstrated that the Secretary had acted beyond the scope of his statutory authority.

Even if one assumes, *arguendo*, that the court was correct that the issuance of patents by the Secretary is unreviewable since it is within his statutory authority[8] the holding is meaningless because the Secretary never approached a decision of whether patents should issue. Thus, a question of whether to issue patents does not exist. Therefore, the very basis of the decision of the Court below was never present.

The Court below determined that its decision was controlled by the decisions of this Court in the cases of *Malone v. Bowdoin*, 1962, 369 U.S. 643, 82 S.Ct. 980, 8 L.Ed. 2d 168; *Dugan v. Rank*, 1963, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed. 2d 115; and *Larson v. Domestic & Foreign Commerce Corp.*, 1949, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed., 1928. The Court noted that those decisions had controlled its decisions in certain cases in the Fifth Circuit, namely *Simons v. Vinson*, 5 Cir., 1968, 394 F.2d 732, cert. denied, 393 U.S. 968, and *Gardner v. Harris*, 5 Cir., 1968, 391 F.2d 885 and that those decisions were binding on it in this case. What the Court below failed to recognize is that the decisions by this Court, as well as the Fifth Circuit decisions which applied them, did *not* involve an administrative proceeding nor were they based on statutory rights granted by the public land laws of the United States. Each of those cases were original actions to determine title, to abate a nuisance, in ejectment, or to judicially impose a duty not required by, or outside of, the statute under which certain officials were acting. *Simons v. Vinson* was an action to acquire title through quit

[8]The Court is not correct as evidenced by opinions of this Court and circuits other than the Fifth Circuit.

claim deeds from the United States and had no relationship to any administrative proceeding. *Gardner v. Harris* was an original action brought to abate a nuisance consisting of barricades. *Malone v. Bowdoin* was an original action in ejectment to try title. *Dugan v. Rank* was an action brought to enjoin the United States from diverting certain waters. *Larson v. Domestic and Foreign Commerce Corporation* was an action brought to enjoin the sale of coal to a third party based on a contract. Therefore, in erroneously applying the rule of those cases as governing the instant case, the Court below is necessarily denying the judicial review protection recognized by all other Federal Courts and this Court in proceedings in which administrative decisions of the Secretary of the Interior were made subject to judicial review.

The chief case relied upon by the Court below is *Simons v. Vinson*. That case was brought for the enforcement of title to land and involved the question as to whether a parcel of land had become plaintiffs property by reasons of accretion. That case had nothing to do with individual rights granted under the land laws of the United States nor did it involve a prior administrative proceeding which denied the applications of such individual land rights. Under the facts of the *Simons* case, the Court determined there that the doctrine of sovereign immunity applied. The question of whether the case was governed by that doctrine arose there because the appellants had brought the action against officers of the Bureau of Land Management and the Bureau of Indian Affairs. This "unsophisticated attempt to avoid the defense of governmental immunity" was recognized by the Court and it ruled that under the circumstances of that case the doctrine of sovereign immunity applied. The Court in the *Simons* case did not determine that the Secretary of the Interior in his administration of the public land law was immune from judicial review nor was such a question even at issue. Nevertheless, the Fifth Circuit in the instant case has greatly extended the reach of the *Simons* case and made the determination that the unrelated rule of the *Simons* case requires it to apply the doctrine of sovereign immunity to any action brought for judicial review of an administrative decision by the Secretary of the Interior.

The Ninth Circuit, as well as the Tenth and District of Columbia Circuits, have rendered many decisions in which they reviewed decisions by the Secretary of the Interior in his administration of the public land laws. None applied the doctrine of sovereign immunity to preclude review where the Secretary's action was the result of an administrative proceeding pursuant to the public land laws. Every Circuit Court except the Fifth has properly treated the decision of the Secretary as an agency action reviewable under the provisions of the Administrative Procedure Act. *Ickes v. Virginia Colorado Development Corp.*, 295 U.S. 639, 55 S.Ct. 888, 79 L.Ed. 1627 (1935); *Wilbur v. U.S. ex rel Krushnic*, 280 U.S. 306, 50 S.Ct. 103, 74 L.Ed. 445 (1930); *State of Washington v. Udall*, 417 F.2d 1310, 9th Cir. (1969); *Heffelman v. Udall*, 388 F.2d 109, 10th Cir. (1967); *Coleman v. United States*, 363 F.2d 190, 9th Cir. (1966); *Ferry v. Udall*, 336 F.2d 706, 9th Cir. (1964), cert. denied 381 U.S. 104, 85 S.Ct. 1449, 14 L.Ed.2d 286; *Adams v. Witmer*, 271 F.2d 29, 9th Cir. (1958); *Southwestern Petroleum Corporation v. Udall*, 361 F.2d 650, 10th Cir. (1966); *Finch v. U.S.*, 387 F.2d 13, 10th Cir. (1966), cert. denied 390 U.S. 1012, 88 S.Ct. 1262, 20 L.Ed.2d 162; *Texaco, Inc. v. Hickel*, C.A.D.C., Case No. 23097 decided August 19, 1970; *West Coast Exploration Company v. McKay*, 213 F.2d 582 C.A.D.C. (1954). Cert. Den. 347 U.S. 989, 74 S.Ct. 850, 98 L.Ed. 1123 (1954).

The Ninth Circuit discussed the applicability of the Administrative Procedure Act to decisions of the Secretary of the Interior in *Converse v. Udall*, 399 F.2d 616, 9th Cir. (1968); cert. den. 393 U.S. 1025, 89 S.Ct. 635, 21 L.Ed.2d 569. There, it said:

> "However, we have held that the Administrative Procedure Act does apply, *Adams v. Witmer*, 9 Cir., 1958, 271 F.2d 29, 32-33; *Coleman v. United States, supra*, 363 F.2d at 194. The portion of our decision in *Coleman* dealing with the Administrative Procedure Act was not questioned by the Supreme Court. See also *Foster v. Seaton*, 1959, 106 U.S. App. D.C. 253, 271 F.2d 836, cited with apparent approval in *West v. Humboldt Placer Mining Co.*,

1963, 371 U.S. 334, 338 n.7, 83 S.Ct. 379, 9 L.Ed.2d 350. Cf. *Chournos v. United States*, 10 Cir., 1964, 335 F.2d 918."

There is, therefore, a clear conflict between the Fifth Circuit holding in this case and the determinations by other Circuit Courts concerning the right to judicial review of decisions of the Secretary of Interior in connection with his administration of the public land laws.

II

The Decision of the Fifth Circuit In Determining That Administrative Decisions of the Secretary of the Interior Rejecting Vested Rights Under The Public Land Laws Are Not Subject to Judicial Review is in Conflict With Decisions of This Court.

The Fifth Circuit determined that the doctrine of sovereign immunity constituted a complete barrier to judicial review of administrative decisions of the Secretary of the Interior made by him under the Public Land Laws. The Court thereby necessarily determined that the judicial review provisions of the Administrative Procedure Act (5 USC 701-706) were not applicable to decisions of the Secretary of the Interior. That decision is in conflict with the decision of this Court in the case of *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Furthermore, this Court itself has reviewed decisions of the Sectetary of Interior. *Ickes v. Virginia-Colorado Development Corp., supra; Wilbur v. U.S. ex rel Krushnic, supra.*

The *Abbott Laboratories* decision clearly established the principle of law that judicial review of a final agency action on behalf of an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. This Court went on to point out in the *Abbott* decision that the legal principles of earlier cases under which judicial review was entertained were reinforced by the enactment of the Administrative Procedure Act which this Court said

embodies the basic presumption of judicial review on behalf of one suffering legal wrong because of Agency action, or who is adversely affected or aggrieved by agency action within the meaning of a relevant statute so long as no statute precludes such relief or the action is not one committed by law to agency discretion. This Court further pointed out in the *Abbott* case that the Administrative Procedure Act provides not only for review of an agency action made reviewable by statute but also for review of final agency action for which there is no other adequate remedy in a Court.[9] This Court also observed that the generous review provisions of the Administrative Procedure Act must be given a hospitable interpretation and that the Court would restrict access to judicial review only upon a clear and convincing showing of a contrary legislative intent.

In the instant case, Peititoner is suffering a legal wrong and has been adversely affected by the decision of the Secretary of Interior denying his application filed pursuant to the Act of July 17, 1854, and Interiors *Kean* decision of 1914, to implement their grants and authorities. The Secretary's decision was based solely on an erroneous legal interpretation of the nature of the documented authority submitted by Colson. The matter did not in any way concern those areas of discretion which are reserved to the Secretary of the Interior such as exist under the Taylor Grazing Act. Since the denial by the Secretary of the application was based strictly on an erroneous quasi-judicial determination and not on discretionary grounds, judicial review is not prohibited by law or judicial precedent but, to the contrary, is required under the Administrative Procedure Act.

The decision of the Fifth Circuit is in direct conflict with the principles enunciated by this Court in the *Abbott Laboratories* case. It cannot be said that the Fifth Circuit has provided a "hospitable" interpretation of the Administrative Procedure Act or that it has recognized the Act's generous review provisions. The right to judicial review as enunciated in the

[9]No other remedy exists in this case.

Abbott case and the judicial review provisions were presented to the Courts below. Instead of applying those rights, the Fifth Circuit did not even direct itself to their substance or even refer to them in its Opinion, although they were stressed in the Petitioner's Briefs as well as in his Petition for Rehearing. It is, therefore, clear that in this case, because of its heavy reliance on the unrelated case of *Simons v. Vinson, supra*, the Court below has determined that the doctrine of sovereign immunity prohibits review of any agency action taken by the Department of the Interior or the Bureau of Land Management under the public land laws even if statutory property rights in public land are thereby denied. Thus, the Court below in deciding the federal question as to reviewability of such an administrative decision rendered by the Secretary of the Interior, has decided an important federal legal question and has done so in a way that is clearly in conflict with the decision of this Court in the *Abbott Laboratories* case.

III

If The Question of The Reviewability of An Administrative Decision by The Secretary of the Interior Has Not Been Settled by This Court, It Is a Federal Question of Such Importance That It Should Be.

It is recognized that this Court has not specifically passed on the exact question of whether the doctrine of sovereign immunity is superior to the applicability of the review provisions of the Administrative Procedure Act to administrative decisions made by the Secretary of the Interior under the public land laws. Perhaps the reason that this is so is because this case presents for the first time a decision by a Court denying judicial review of an adverse judicial (as opposed to discretionary) decision of the Secretary on jurisdictional grounds based on the doctrine of sovereign immunity.

The importance of this federal question cannot be overstated. Congress has delegated to the Secretary of the Interior the job of administering the public land laws. These are extensive laws dealing with an immense range of rights. If decisions by the

Secretary of the Interior are not subject to restraint and correction by judicial review, then statutory rights arising under public land laws are judicially placed in the Secretary's uncontrolled hands, thus freeing him to be as arbitrary, capricious, and erroneous as he sees fit as long as he operates in the areas of his delegated authority. Thus, mining leases, oil leases, forest preserves, grazing lands, scrip rights, and a multitude of other statutory property rights created by Congress could be administered by the Secretary of the Interior as his own private domain. For example, in this case the Secretary denied to Colson that certain lands applied for were vacant public domain. It later developed, during the pendency of this case before the Secretary, that the Secretary was repeatedly offering to dispose of and patent the very same lands to others as vacant public domain. Thus, there can be little doubt that the Secretary has demonstrated the ability to act in a completely arbitrary manner.

If the Secretary of the Interior does enjoy immunity from judicial review of his activities and decisions in dealing with the public domain and in administering public land laws, then this should be made clear in order that the Congress can rectify such an intolerable situation. But if, as appears to be the case, the Fifth Circuit has deliberately raised a new and novel concept of the superiority of the doctrine of sovereign immunity over the efforts of Congress and this Court to give "hospitable" treatment to judicial review of administrative decisions of federal agencies, there can be no doubt that a federal question has been presented that should be settled in this Court.

IV

The Fifth Circuit Decision Takes Statutory Property Rights And Interests In Land From Petitioner Without Just Compensation In Violation Of The Fifth Amendment Of The United States Constitution.

In the first instance, the Act of July 17, 1854, separated land interests granted by the Treaty of Prairie du Chien, from Petitioner's predecessors in interest and transferred those land

interests to federal ownership. In consideration of that transfer a right to receive an equal amount of replacement land from the public domain was granted under the Act of July 17, 1854. These rights, to the extent of acreage represented by Petitioner's legally documented authorizations, were conveyed to Petitioner. These rights represent an obligation of the United States, honorably entered into by it, for valuable consideration, which are a continuing and existing charge upon the public domain which is already authorized and granted by the Congress.[10]

Additionally, the Interior Department in the *Kean* matter did not create or enlarge a charge upon the public domain, for that decision merely assists the implementation of the program adopted by Congress in the Act of July 17, 1854. This case is, therefore, not a contest to establish a property right against the United States nor is it a suit which seeks to create a burden upon the public treasury or to expend its force upon the public domain.

The United States long ago committed itself by the contracts represented by the 1854 Act to honor its side of the bargain struck by the Treaty of Prairie du Chien and the Act of July 17, 1854. Congress confirmed its obligation by enacting the Act of August 31, 1964, which authorized to holders of rights such as Petitioner's an additional right to receive a money settlement in satisfaction of their prior but continuing land rights. The Act of August 31, 1964, authorized and directed the Secretary of the Treasury to make settlement with a claimant holding rights such as these and who elected to receive cash instead of public land by paying the cash settlement from any money in the Treasury not otherwise appropriated so as to thereby satisfy the claim or

[10]Should this case not be reviewed, the government will be unjustly enriched to the extent of the land in question since no one other than petitioner can exercise these claims, not only because there are no claimants adverse to petitioner but also by reason of the requirements of the Scrip Recordation Act of 1955 and the Act of August 31, 1964. Thus, the doctrine of sovereign immunity will have been utilized by the government in a manner and to achieve a result never intended.

holding. The financial cost of settling claims such as these by charge upon the Treasury or the public domain has already been accepted by the United States. Therefore, neither this suit nor Petitioner's application to the Secretary of the Interior to satisfy his rights will create or enlarge an obligation or cost upon either the Treasury or the public domain of the United States.

Stipulations in District Court that Petitioner's application for the vacant public domain claimed by him is a priority selection of the land under the Taylor Grazing Act, that Petitioner's documents are valid and have not been used to acquire public land, that they are for his benefit and authorize exclusive management and/or sale and full control and use of land claimed in satisfaction of them, evidence the extensive nature of Petitioner's property rights. Petitioner's rights also include the benefits granted by the Taylor Grazing Act that upon application for land suitable to satisfy such a right to claim it, advanced by a qualified applicant such as Petitioner, the Secretary is obliged to perform the duties imposed upon him by the Taylor Grazing Act for the benefit of the applicant. *Richardson v. Udall*, 253 F. Supp. 72 (1966).

Petitioner's rights are generic to many acts by which Congress has authorized the granting of rights to claim or obtain public lands. Petitioner's rights are of the highest order of these property rights because the Act of July 17, 1854, contemplated a complete exchange of land as a matter of right. That Act created and granted an immediate vested right which becomes fixed as to the particular lands at the time of their selection by the present owner of these rights to whom they have been conveyed, in this case, Colson, in accord with the method of conveyance sanctioned by this Court in *Midway v. Eaton*. Other acts of Congress grant rights of lesser dignity in that claimants under them have not surrendered land interests for their rights but rather are merely authorized to seek to obtain land to fulfill a grant of legislative grace. These statutory rights are protected by the Constitution and enforced by the owner's right of recourse to the courts. The court in *West Coast Exploration Co. v. McKay*, 213 F.2d 582, C.A.D.C. (1954), rejecting the notion

that the doctrine of sovereign immunity precludes correction of the action or inaction of a public officer under the rule of *Larson v. Domestic and Foreign Commerce Corporation, supra*, stated:

> "Under such a ruling a person who had, under the homestead laws, fully satisfied the requirements for residence and cultivation and who had paid the required fees could be denied a patent to the land by the Secretary of the Interior acting wholly arbitrarily and the homesteader would be without recourse in the courts. The courts would be obliged under such a construction of the *Larson* case as is contended for to refuse to consider the case. Under such a ruling the locator of a mining claim who made the required discovery of ore, performed the required assessment work and paid the necessary fees, could be arbitrarily denied a patent and there would be no recourse in the courts. *Such a denial of recourse to the courts would be abhorrent to the justice according to law contemplated by the Constitution. The due process clause of the Fifth Amendment endows the United States courts with power, even though there is no statutory provision for direct review of the action of a public officer, to protect against arbitrary action by such an officer.* No such meaning of the *Larson* case as is contended for can in our view, be attributed to the Supreme Court." (Emphasis Added). (P. 596).

Recognition of such rights as being those protectable by the due process provisions of the Administrative Procedure Act authorizing judicial review of the agency action continued to be recognized by the Ninth Circuit in *Coleman v. United States*, 363 F.2d 190, 9 Cir. (1966).[11]

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[11] Reversed on other grounds, 390 U.S. 599, 88 S.Ct. 1327, 20 L.Ed. 2d 170 (1968), without effect on the portion of the *Coleman* decision dealing with the Administrative Procedure Act which was not questioned by the Supreme Court. See *Converse v. Udall*, 9th Cir. (1968) 399 F.2d 616, Cert. Den. 393 U.S. 1025, 89 S.Ct. 635, 21 L.Ed.2d 569 (1969).

"It has long been established that a *qualified entryman upon public lands of the United States*, whether as a locater of a mining claim, as a homesteader, or *as one asserting rights under others of the multifarious laws governing entries on public land, who perfects his entry by compliance with the applicable act of Congress, thereby acquires a right to the land as against the sovereign itself*, as well as third persons. *Wilbur v. United States, ex rel Krushnic*, 280 U.S. 306, 50 S.Ct. 103, 74 L.Ed. 445 (1930). It is such a legal right which appellant here seeks to assert, and it is not a right which the Secretary of the Interior may, in his discretion, ignore or which he may reject 'in the absence of fraud or imposition'. *This is precisely the kind of right which the Administrative Procedure Act, with its provisions for judicial review, was designed to safeguard from arbitrary, capricious, and illegal deprivation by action of executive and administrative agencies. Adams v. Witmer*, 9 C.C.A. 1959, 271 F.2d 29." (P. 196) (Emphasis Added)

The Fourth Circuit in *Switzerland v. Udall*, 337 F.2d 56, 4th Cir. (1964), properly noted the type of Constitutional violation which is present in this case when it noted there:

"The *effect of the erection of the doctrine of sovereign immunity to foreclose equitable actions* is to prohibit equitable remedies without consideration of the adequacy of the legal remedy or, indeed, of the interests of the United States. *The result is that every claim advanced by an overly zealous agent of the sovereign and by those multitudes of governmental agents who feel unauthorized to relinquish a governmental claim, however baseless it may appear, effects an informal seizure as if by condemnation.* It is done, however, without consideration of the appropriateness of condemnation or a comparison of the potential advantage to the United States with the cost of payment of just compensation." (P. 60) (Emphasis Added)

The remedy for wrongful administrative taking is, however, not restricted to money judgments in cases such as Petitioner's where his public land law property rights have been seized and withheld, as opposed to the infliction of a limited degree of injury to property of a complainant which is not necessarily seized and withheld and which event does not arise under the public land laws. The Supreme Court in *Land v. Dollar*, 330 U.S. 731, 738-739, 67 S.Ct. 1009, 1012, 91 L.Ed. 1209 (1946) said:

> ". . . . . But public officials may become tort-feasors by exceeding the limits of their authority. *And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.*" (Emphasis Added)[12]

Although the *Malone* case differs from the holdings of *Land v. Dollar*, and of *United States v. Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171, insofar as *Malone* erects the doctrine of sovereign immunity to prohibit equitable remedies against officers of the United States to correct injuries done by them to a complainant's property, it must be noted that the *Malone* case did not in any way condone the taking of property without just compensation. The difference between the *Land* and *Lee* cases on the one hand and *Malone* on the other was that in *Malone* there existed a means for the recovery of damages sustained by reason of the government action. Petitioner Colson's case is readily distinguishable from the *Malone*, *Larson* and *Dugan* cases, in that those cases did not judicially arise by way of judicial review of a wrongful administrative action, nor did they

[12]There is no alternative remedy such as action in the Court of Claims available to Colson.

arise from rights grounded in the public land laws, nor did they represent circumstances whereby a total deprivation of property ownership without due process or just compensation was occurring. Petitioner's property rights are entitled to the protection of the Constitutional safeguards including the Fifth Amendment and the restoration of those rights to him for enforcement by him through equitable remedies.

Petitioner therefore respectfully submits that because the Secretary's rejection of his claim based on an erroneous interpretation as to matters of general law was arbitrary and illegal,[13] because that rejection curtailed Petitioner's rights as a Congressional donee by the substitution of the Secretary's judgment for the will of Congress, because the Secretary refused to discharge a mandatory and purely ministerial duty imposed by law upon the Secretary for the Petitioner's benefit, the Secretary's action and refusal of the District and Appeals Courts to accept jurisdiction to review the merits of the judicial appeal have resulted in the taking of Petitioner's property without due process and without just compensation in violation of Article V of the United States Constitution (Appendix K). Petitioner has qualified for and is entitled to the protection of the Constitutional safeguards. (Concurring opinions of Judges Prettyman and Bazelon in *West Coast Exploration Co. v. McKay* (1954) 231 F.2d 582, Cert. Den. 347 U.S. 989, 74 S.Ct. 850, 98 L.Ed. 1123 (1954).

[13]It will be recalled that the Secretary's decision was based solely on his opinion that Petitioner Colson's authorizations were not adequate because they did not contain the words "select and locate." Those words are not words of art and there is no law, nor was any cited, that supports the Secretary's position on the part of law.

CONCLUSION

Under the circumstances of this case, your Petitioner respectfully submits that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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November 15, 1970

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26212

BARNEY R. COLSON, ET AL.,

Appellants,

versus

WALTER J. HICKEL, Secretary of the Interior,

Appellee

Appeal from the United States District Court for the Middle District of Florida

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(June 16, 1970)

Before COLEMAN, SIMPSON, and MORGAN, Circuit Judges

COLEMAN, Circuit Judge. It is hardly likely that the Treaty Makers at Prairie du Chien in the year 1830 had any idea that their work would be the starting point for litigation a hundred and forty years out in the future, but it was. This case bristles with legal questions, but the facts are undisputed. The legal complications are compounded by the presence of two separate sets of land scrip, each of a history different to the other. The opinion of the District Court is reported at 278 F. Supp. 826 (M.D., Fla., 1968). We affirm.

I

THE FACTS

A. Basic History

On July 15, 1830, by the Treaty of Prairie du Chien (7 Stat. 328) the United States set aside to the half-breeds of the Sioux Indians a reservation of land in Minnesota. Twenty four years later, by the Act of July 17, 1854 (10 Stat. 304) Congress extinguished this reservation by the issuance of scrip certificates in lieu of the reserved lands.

The pertinent provisions of the 1854 Act read as follows:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President be, and he is hereby, authorized, to exchange with the halfbreeds or mixed-bloods of the Dacotah or Sioux nation of Indians, who are entitled to an interest therein, for the tract of land lying on the west side of Lake Pepin and the Mississippi River, in the Territory of Minnesota, which was set apart and granted for their use and benefit, by the ninth article of the Treaty of Prairie du Chien, on the fifteenth day of July, one thousand eight hundred and thirty; and for that purpose he is hereby authorized to cause to be issued to said persons, on the execution by them, or by the legal representatives of such as may be minors, of a full and complete relinquishment by them to the United States of all their right, title, and interest, according to such form as shall be prescribed by the Commissioner of the General Land-Office, in and to said tract of land or reservation, certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the said grant or reservation *pro rata* among the claimants – which said certificates or scrip may be located upon any of the lands within said reservation not now occupied by actual and *bona fide* settlers of half-breeds or mixed-bloods, or such other persons as have gone into said Territory by authority of law, or upon any other unoccupied lands subject to preemption or private sale, or upon any other unsurveyed lands, not reserved by Government, upon which they have respectively made improvements:

> *Provided*, That said certificates or scrip shall not embrace more than six hundred and forty, nor less than forty acres each, and provided that the same shall be equally apportioned, as nearly as practicable, among those entitled to an interest in said reservation: *And provided further*, That no transfer or conveyance of any of said certificates or scrip shall be valid."

The genesis of the pending litigation is supplied by the express prohibition of the statute: *"no transfer or conveyance of any of said certificates or scrip shall be valid."*

It did not take long for someone to find a hole in the fence. This is how it worked: Anyone desiring to acquire scrip rights from an Indian to whom the scrip had been issued would obtain from the scripee the scrip certificate. He would also obtain two powers of attorney, left blank as to the description of the land and as to the name of the attorney. By one power of attorney the scripee authorized the selection of the land and the location of the scrip, coupled with the power to obtain a patent from the Government. By the second instrument the attorney in fact was authorized to sell and convey any land which the scripee might thereafter acquire. The first instrument would be filed with the General Land Office. After the location was made and a patent issued in the name of the scripee, a conveyance of the land would then be executed and delivered under the authority of the power of attorney to sell.

The General Land Office quickly challenged this procedure. It held such transactions to be invalid as in violation of the statutory prohibition. The Courts, however, did not agree with that position. The issue was unequivocally settled by the Supreme Court in *Midway Company v. Eaton*, 183 U.S. 602, 22 S.Ct. 261, 43 L.Ed. 347 (1902), which went up on a writ of error to the Supreme Court of Minnesota.

Citing its prior decisions in *Thompson v. Myrick*, 99 U.S. 291 (1878), and *Felix v. Patrick*, 145 U.S. 317, 12 S.Ct. 862, 36 L.Ed. 719 (1892), the Court approved the use of powers of attorney as above described "because the transactions did not constitute a transfer of the scrip as such *** the transactions were intended as a conveyance of the land and represented that intention, and could not be shown to be a transfer of the scrip." The Court specifically alluded to the language in *Thompson v. Myrick*, supra, to the effect that it could conceive of no reason

why a scripee was not at liberty, either before or after location was made, to enter into an agreement to secure title to the located lands on the payment of an agreed consideration.

By Interior decision D-29,200, dated April 29, 1914, the decisions in *Thompson v. Myrick, supra*, and *Midway Company v. Eaton, supra*, were recognized by the Department in the following language:

> "In view of the holding of the Court, it would appear that where a person has purchased land so located and patented under this class of scrip and the title has failed because the Government had already disposed of the land, such purchaser shall be permitted to govern the use of the scrip for purposes of making a new location. Of course, the new selection would have to be in the name of the scripee as was the former one."

B. The Anthony Renville – Anna R. Kean – Barney R. Colson Scrip

This scrip, Certificate 398 D, was originally issued to Anthony Renville, a Sioux halfbreed, for 160 acres of land. On January 10, 1874, Renville executed and delivered the customary powers of attorney to John S. Newman. March 1, 1877, in the name of Renville, Newman obtained a patent to land located in the dried bed of a previously existing lake in Indiana. By intervening conveyances the title to the land became vested in Anna R. Kean. This patent was held void by the United States Supreme Court in *Kean v. Calumet Canal and Improvement Company*, 190 U.S. 452, 23 S.Ct. 651, 47 L.Ed. 1134 (1903). The Court held that in 1853 the property had been conveyed by the United States to the State of Indiana under the Swamp Land Act of 1850.

In 1913, the Circuit Court of Lake County, Indiana, in the case of *Anna R. Kean v. John S. Newman, Et Al.*, held that as a result of the cancellation of the patent the contract for the exchange of certificate 398-D had been left unfulfilled as expressed in the Renville power of attorney and that the contract, being specific, for valuable consideration, and for Anna Kean's benefit, remained in full force and effect. The Department of the Interior, April 29, 1914, Case D-29,200, supra, determined that Anna R. Kean should be permitted to govern the use of the scrip for the purpose of making a new

selection, requiring only that the new claim be made in the name of the scripee.

On June 10, 1914, Anna R. Kean, acting for Anthony Renville, his heirs and legal representatives, executed a power of attorney, in blank as to the designee, to enter upon, and take possession of any and all pieces and parcels of land or the timber or other materials thereon in the State of_____, "which we own, or which we may hereafter acquire or become seized of" under and by virtue of Scrip Number 398, for 160 acres.

This power of attorney was executed in Cook County, Illinois.

C. The Ellen Angie /Williams/ Scrip

In Dewey County, South Dakota, on February 21, 1910, Ellen Angie appointed Jesse L. Linn her true and lawful attorney to enter upon and take possession of any and all lands which she then owned or in which she was entitled or interested, and to take possession of any and all such lands by virtue of the location of Sioux half-breed Scrip Number 379-C, for 80 acres, issued to her under the Act of Congress of July 17, 1854, and likewise empowered the attorney in fact to select and convey such lands, further empowering the attorney in fact to appoint a substitute or substitutes, etc.

On December 26, 1914, Jesse L. Linn executed a power of attorney, in blank as to the designee.

This instrument was executed in Polk County, Oregon.

On May 19, 1915, in Dewey County, South Dakota, Ellen Angie Williams quitclaimed the land, grantee blank, description blank, which might thereafter be acquired by location of Sioux halfbreed Scrip Number 379-C.

In 1925, Colson acquired the powers of attorney and other documents from a holder which guaranteed the validity of the scrip.

D. Subsequent Proceedings Prior to this Litigation

On January 20, 1956, the Director of the Bureau of Land Management, Department of the Interior, advised Barney R. Colson that the above mentioned scrip certificates were valid, had not theretofore been presented to acquire public land of the United States, that they might be used for that purpose by

the attorney in fact or the substitute attorney in fact, and that the material presented by Colson evidenced his ownership of the scrip certificates. The scrip certificates were thereafter duly recorded in department records as scrips under the Act of August 5, 1955 (69 Stat. 534).

On August 27, 1958, Colson, invoking the scrip, filed his claim with the Eastern States Land Office, Bureau of Land Management, Department of the Interior, claiming 239.99 acres of land in Florida. He also petitioned for appropriate classification of the vacant lands under the Taylor Grazing Act, 43 U.S.C. §315(f). On February 26, 1959, the Eastern States Land Office agreed that Colson might claim a portion [144.42 acres] of the land described in his application. That portion of the application for other lands over and above 144.42 acres, was disapproved.

Colson then appealed to the Director, Bureau of Land Management, on the question of whether a certain parcel, known as land parcel K, was vacant public domain and therefore available to him under his scrip credentials.

This, from Mr. Colson's standpoint, turned out to be a very unfortunate step. The Director of the Bureau held that Colson's scrip, though valid, was insufficient to support his application to any land in any respect because the powers of attorney and quitclaim deed did not authorize Colson to locate in the name of either scripee the lands to be acquired. This was the sole ground for the decision.

Mr. Colson then appealed to the Secretary of the Interior, August 24, 1960.

II

THE LITIGATION

On September 16, 1963, the Secretary affirmed the decision of the Bureau of Land Management. Colson unsuccessfully requested reconsideration of the Secretary's decision. He then filed suit in the United States District Court for the Middle District of Florida against the Secretary of the Interior, invoking §10 of the Administrative Procedure Act, and the Declaratory Judgment Act, 28 U.S.C. §§2201, 2202, and further asserting diversity jurisdiction and that the matter in controversy arose under the laws of the United States. It was

alleged that the District Court had venue over the lands under 28 U.S.C. §1392.

The District Court agreed with the Secretary of the Interior that the documents in question did not confer upon Colson the right to select and locate lands under the scrip certificates in the name of the scripees; that it might be presumed, in the absence of any evidence to the contrary, that all of the original scripees are now dead; that even if the powers of attorney had been valid, they were revoked by the death of the scripees, unless the powers were coupled with an interest; if they were coupled with an interest the transfer would constitute a violation of the prohibition that no transfer or conveyance of the scrip would be valid; that the suit was against the United States, which was not a party, and had not waived its sovereign immunity; that Colson is barred from maintaining his action because of laches; that Colson had shown no right to relief; that the Secretary of the Interior had made no determination as to whether any of the lands applied for by Colson is available for selection; and that judgment would be entered for the Secretary.

On this appeal, Mr. Colson argues that the District Court erred in holding that this was an action against the United States; in holding that the action is barred by laches; in holding that the Colson documents did not entitle him to exercise and consummate the claim to vacant public domain and/or money in lieu of the land.

The Secretary, in his brief, narrows the issues to two:

Whether the District Court had jurisdiction, and whether the District Court was correct in holding that Colson had no right to claim public lands under the substitute powers of attorney.

III

THE DECISION

We are of the opinion that the prior decisions of this Court, relying upon decisions of the Supreme Court, require us to hold that this was, in fact, a suit against the United States, to which it had not given its consent.[1]

---

[1] We are aware of the decision, and the dissenting opinion, in State of Washington v. Udall, 9 Cir., 1969, 417 F.2d 1310, 1322.

Simons v. Vinson, 5 Cir., 1968, 394 F.2d 732, cert. denied 393 U.S. 968, was a suit against officials of the Department of the Interior and its subordinate agencies for the enforcement of title to land on the Red River. The suit asserted that by virtue of a treaty with Spain, and subsequent decisions of the Supreme Court, the land in question had become the property of plaintiffs by accretion. With one judge dissenting, it was held that the immunity of the sovereign extended to the Department of the Interior and its agencies, that the suit was, in fact, against the sovereign because it would operate against the public domain. The dismissal ordered by the District Court was affirmed.

Gardner v. Harris, 5 Cir., 1968, 391 F.2d 885, was a case in which a private citizen brought suit against the Superintendent of the Natchez Trace Parkway to abate a nuisance caused when the Superintendent erected barricades across an easement owned by the plaintiff and which had afforded him ingress and egress from the Parkway. The district court held that the Superintendent had exceeded his statutory authority and was thus amenable as an individual to injunctive relief. This Court reversed. It was further held that the Superintendent, in the administration and maintenance of the Natchez Trace, was acting without his statutory powers. It was said, "merely because the Superintendent may have been acting wrongfully in interfering with plaintiff's access to the highway, either as a matter of violation of property rights under the deeds or as a tort under principles of general law, does not amount to circumstances fulfilling the exception that the officer must be acting beyond his statutory powers," citing *Switzerland Company v. Udall*, 4 Cir., 1964, 337 F.2d 56, dealing with a similar situation on the Blue Ridge Parkway. It was noted, footnote 11, 391 F.2d at 888, that the decision did not preclude a timely action in the proper forum for just compensation.

These decisions were grounded upon *Malone v. Bowdoin*, 1962, 369 U.S. 643, 82 S.Ct. 980, 8 L.Ed.2d 168; *Dugan v. Rank*, 1963, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 115; and *Larson v. Domestic and Foreign Commerce Corp.*, 1949, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1928.

In *Simons v. Vinson, supra*, 394 F.2d at 736, it was stated

> "[T]he suit is unquestionably against the United States. The corollary is clear — the United States is an indispensable party to such action. Inasmuch as it has not consented

to be sued, the Court lacks jurisdiction to maintain the suit unless appellants can show that it is within one of the exceptions to the Dugan v. Rank general rule. Appellants must show either that the statutes are void under which Congress authorized the Secretary of Interior to lease the disputed land, or that the Secretary or his agents acted beyond the scope of their statutory authority."

The matter of the issuance of the patents was clearly within the valid statutory authority of the Secretary of the Interior and his agents. The *Dugan v. Rank* exceptions, therefore, are of no assistance to the appellant.

The dismissal in the District Court was correct and we accordingly find it unnecessary to discuss or decide the other points raised by the parties on appeal.

The judgment of the District Court is

AFFIRMED.

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1969

No. 26212

D.C. Docket No. CA 63-26-Oc.

BARNEY R. COLSON, ET AL,

Appellants,

versus

WALTER J. HICKEL, Secretary of the Interior,

Appellee

Appeal from the United States District Court for the Middle District of Florida.

Before COLEMAN, SIMPSON and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that appellants pay to appellee, the costs on appeal to be taxed by the clerk of this Court.

June 16, 1970

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26212

BARNEY R. COLSON, ET AL.,

Appellants,

versus

WALTER J. HICKEL, Secretary of the Interior

Appellee.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(August 17, 1970)

Before COLEMAN, SIMPSON and MORGAN, Circuit Judges

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX D

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

October 7, 1970

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

Re: No. 26212 – Barney R. Colson, et al, vs. Walter J. Hickel, Secretary of the Interior.

Gentlemen:

The following action has this day been taken in the above case:

x x x x x x x x x x x x x x x x x

(X) A further stay of mandate has been granted to and including 11/15/70.

x x x x x x x x x x x x x x x x x

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By s/Claudette Staiger
Deputy Clerk

cc: Mr. James E. Rodgers
Mr. Herbert Pittle
Mr. Roger P. Marquis

APPENDIX E

IN THE

United States District Court

FOR THE

MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

No. 63-26-Civ-Oc

BARNEY R. COLSON, ET AL.,

Plaintiffs,

versus

STEWART L. UDALL, Secretary of the Interior

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(January 4, 1968)

Findings of Fact

1. Plaintiff is a citizen of the United States and a citizen and resident of the State of Florida

2. Defendant is the Secretary of the Interior.

3. By Article Nine of the Treaty of Prairie du Chien, concluded with the Sioux Indians on July 15, 1830, 7 Stat. 328, that Tribe ceded to the United States certain land in the Territory of Michigan. Subsequently, it was determined to extinguish the Sioux Half Breed Reservation which had been established for those Indians and, by the Act of July 17, 1854, 10 Stat. 304, the President was authorized by Congress to issue certificates to those individuals who would relinquish the use of those lands authorized by Article Nine of the Treaty of Prairie du Chien.

4. The Act of July 17, 1854, provided that certificates of scrip issued permitted those Indians to locate the scrip upon specified types of land, including "unoccupied lands subject to preemption or public sale" and the Act expressly stated that "no transfer or conveyance of any of said certificates or scrip shall be valid."

5. Under the authority of the Act of July 17, 1854, Certificate No. 379-C was issued to one Ellen Angie for 80 acres of land and Certificate No. 398-D was issued to Anthony Renville for 160 acres.

6. The plaintiff, on August 17, 1958, filed an application to locate those two certificates on a number of scattered tracts of land owned by the United States in Florida. The lands applied for comprise a total of 239.99 acres.

7. With his application the plaintiff submitted the Ellen Angie scrip and a power of attorney executed December 26, 1914,* whereby one Jesse R. Linn authorized plaintiff to do and perform all of the acts which Linn had previously been authorized to do by Ellen Angie. The power of attorney, among other things, recites that these authorized acts were

> ***to enter upon and take possession of any and all lands which she then owned or to or in which she was entitled or interested, and to enter upon and take possession of any and all lands which she should thereafter acquire or become seized of, or in which she should thereafter become interested by virtue of the location of the "Sioux Half Breed Lake Pipin Reserve Scrip" *** and also, in like manner, authorizing and empowering the said attorney in fact to grant, bargain, sell and convey by good and sufficient deed of conveyance, with or without covenants of warranty, any and all lands already located with said scrip and any and all lands that may be thereafter located with said scrip, or any part or parts thereof; and any and all lands which she should thereafter acquire or become seized of and which she should thereafter become interested in by virtue of the location of said scrip.***

*Apparently the powers of attorney for both the Ellen Angie and Anthony Renville scrip were originally obtained by Linn in 1910 or 1914 but were in blank and when plaintiff acquired substitute powers in 1925, the blanks were filled in with plaintiff's name.

8. There was also submitted with the Ellen Angie scrip a document entitled "Quit Claim Deed," wherein Ellen Angie, then Williams, purported

> *** to remise, release, sell, convey and QUIT CLAIM unto the said *** [Barney R. Colson], his heirs and assigns forever, all the right, title, interest, claim and demand which the said *** [Ellen Angie Williams] has in and to the following described land, the title to which has, or may hereafter, be acquired by location of the Sioux Half Breed Scrip. ***

The space in the deed for the description of the land was left blank.

9. With the Anthony Renville scrip plaintiff submitted a copy of a court decree in which Renville and others were

> *** ordered to execute duplicate powers of attorney to some suitable person to locate the same [the scrip], to receive patents therefor and convey the same when located and patented, the same as such defendants [in that case] could do in person***.

10. With that application plaintiff also submitted a power of attorney executed June 10, 1914, by Anna R. Kean for Anthony Renville "or the heirs and legal representatives of Anthony Renville," appointing plaintiff

> *** our true and lawful attorney, for us, or each of us individually, and in our name, place and stead, to enter upon, and take possession of any and all pieces and parcels of land or the timber or other materials thereon in the State of_____, which we become seized of, or in which we may now or hereafter be in any way interested; under and by virtue of location of Sioux Half Breed Scrip *** and *** to grant, bargain, sell, demise, lease, convey and confirm said land, or any part thereof ***.

11. In a decision rendered February 26, 1959, the Chief, Lands Adjudication Section, Eastern States Land Office, decided that eight tracts, embracing a total of 144.42 acres, were subject to location, but the application was rejected as to the remainder of the tracts on the ground that those lands had

been withdrawn from the public lands of the United States.

12. The plaintiff appealed from that portion of the decision which rejected his application to locate the scrip on the other 39.91 acres. He acquiesced in the remainder of the decision and filed a new application to locate scrip on 57.83 acres which form the northern portion of the Punta Blanca Island, Florida.

13. By decision of July 27, 1960 (BLM 047548), the Bureau of Land Management rejected plaintiff's application to locate any of the scrip. The Bureau thus reversed the decision of the Eastern States Land Office, which had determined that plaintiff was entitled to locate the scrip on 144.42 acres, but affirmed the decision denying plaintiff's rights to locate the scrip on other lands. Plaintiff's application to locate the 57.83 acres as a matter of administrative convenience was considered initially by the Director of the Bureau of Land Management in connection with the plaintiff's appeal.

14. The plaintiff then appealed, in accordance with the rules and regulations of the Department of the Interior, to the Secretary of that Department. By decision dated September 16, 1963 (A-28617), reported at 70 I.D. 409, the Secretary affirmed the decision of the Director of the Bureau of Land Management and held that plaintiff was not entitled to select and locate any lands whatever under the powers of attorney which he held in connection with the scrip certificates relied upon.

15. The Secretary's decision stating the reasons for rejection states, among other things, that after review of the records submitted by plaintiff, copies of which are attached as exhibits to plaintiff's complaint, none contains anything which may be considered to vest power in the plaintiff *to locate in the name of* either of the scripees under the scrip certificates.

16. In addition to the documents mentioned above, there was filed with plaintiff's application certain "Guarantees" executed in favor of the plaintiff by the W. E. Moses Land Scrip and Realty Company, which purportedly guaranteed the validity of the certificates sold to the plaintiff. That document shows that the Ellen Angie scrip was sold for $6,000 and the Anthony Reqville scrip was sold for $13,600.

17. The power of attorney by substitution which plaintiff holds from Linn with relation to the Ellen Angie scrip on its face shows nothing more than that Ellen Angie, by power of attorney dated February 21, 1910, authorized Linn to enter upon and take possession of any and all lands in which she might be interested by virtue of the location of her scrip, and

further authorized Linn to sell and convey any lands already located with said scrip and any and all lands which she would thereafter acquire *by virtue of the location* of said script.

18. The "Guarantees" which plaintiff obtained with respect to the Anthony Renville scrip are meaningless insofar as showing any authority in plaintiff to locate land in the name of the scripee. The document dated June 10, 1914, signed by Anna R. Kean, which recites that Anthony Renville, or his heirs and legal representatives, by Anna R. Kean, a commissioner of court, have made and appointed plaintiff as the lawful attorney for Anna R. Kean to enter upon and take possession of any land which Kean owns or may thereafter acquire by virtue of location of the scrip certificate No. 398-D, does not contain any authority *to locate land in the name of* the scripee.

19. Plaintiff never acquired rights either from the original scripee or by substitution to select and locate lands under the scrip certificates in the name of the scripees.

Conclusions of Law

1. The powers of attorney under which plaintiff claims by substitution do not confer upon plaintiff the right to select and locate public lands of the United States under the scrip certificates in the names of the persons to whom the certificates originally were issued.

2. Since the scrip certificates were issued under authority of the Act of Congress of July 17, 1854, 10 Stat. 304, only to persons who were then alive, it must be presumed, in the absence of any evidence to the contrary, that all of the original scripees are now deceased.

3. Even if plaintiff acquired valid rights to select and locate lands in the name of the scripee by the substitute powers of attorney, the death of the scripees operates to revoke the powers, unless the powers were coupled with an interest.

4. If the powers of attorney which the plaintiff holds by substitution were coupled with an interest, then the transfer would constitute a violation of the prohibition in the Act of July 17, 1854, which provided that "no transfer or conveyance of any of said certificates or scrip shall be valid."

5. The Secretary of the Interior, who is the officer charged with the administration of public lands, has made no determination as to whether any of the lands for which plaintiff has applied is available for selection.

6. It is premature for the court to determine whether any of the land described in the plaintiff's complaint is now available for selection.

7. The "Guarantees" which plaintiff obtained with the substitute powers of attorney do not authorize plaintiff to locate land in the name of the scripee.

8. This action is a suit against the United States, which is not a party and has not waived its sovereign immunity.

9. Plaintiff is barred from maintaining the action by the doctrine of *laches*.

10. The decision by the Solicitor of the Department of the Interior on behalf of the Secretary (A-28617) is supported by substantial evidence, consisting of the record, which contains plaintiff's application and amended applications, and other exhibits, copies of which are attached to the complaint, and therefore is conclusive as a matter of law.

11. Under the facts and the law the plaintiff has shown no right to relief and final judgment will be entered accordingly in favor of the defendant.

DONE AND ORDERED at Jacksonville, Florida, this 4th day of January, 1968.

s/Charles R. Scott
Judge

CC United States Attorney (2)
James E. Rodgers, Esquire (2)

APPENDIX F

IN THE

United States District Court

FOR THE

MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

No. 63-26-Civ-Oc

BARNEY R. OLSON, ET AL.,

Plaintiffs,

versus

STEWART L. UDALL, Secretary of the Interior

Defendant.

FINAL JUDGMENT

(January 4, 1968)

This case was tried by the Court without a jury at Ocala, Florida, on October 23, 1967. The Court, after considering the joint pre-trial stipulation filed herein on September 29, 1967, and the exhibits therein enumerated, and the argument of counsel for the respective parties, has concluded that under the facts and the law the plaintiff has shown no right to relief and that the defendant is entitled to an adjudication in his favor on the merits. It is, therefore, upon consideration,

ORDERED:

1. That the plaintiff, Barney R. Olson, take nothing by his said suit and this action is hereby dismissed with prejudice.

2. The defendant, Stewart L. Udall, Secretary of the Interior, shall have and recover of and from the plaintiff, Barney R. Colson, his costs to be hereinafter taxed.

DONE AND ORDERED at Jacksonville, Florida, this 4th day of January, 1968.

s/Charles R. Scott
Judge

cc: United States Attorney (2)
James E. Rodgers, Esquire (2)

APPENDIX G

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D.C.

(September 16, 1963)

A-28617

Barney R. Colson : **BLM 047548**

: **Locations under Sioux Half-Breed scrip rejected.**

: **Affirmed.**

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the Secretary of the Interior by Barney R. Colson from a decision by the Director, Bureau of Land Management, dated July 27, 1960, holding that Colson has not submitted proper evidence of his authority to locate land under two certificates of Sioux Half-Breed scrip and holding further that, in order to exercise the rights conferred by the certificates, Colson must show, in addition to his authority to locate the land, that his authority in this respect has not been revoked by the scripees.

Colson contends that the Director did not have jurisdiction to inquire into the validity of the documents presented in support of his application to locate the land; that the matter of the validity of the scrip is *res judicata*; that the Director erroneously concluded that the applicant could not locate the scrip with the documents presented; and that all of the lands applied for are available for the satisfaction of the scrip rights. He contends, further, that the Director's decision is a deviation from established law and policy in the matter of Sioux Half-Breed scrip rights and that the decision is a harsh act of discrimination against his rights.

The rights involved have their inception in a treaty concluded with the Sioux Indians in 1830 (7 Stat. 328) under which the Sioux and the United States agreed that the half-breeds of the

Sioux Nation would be permitted to occupy a certain tract of country. Thereafter, by the act of July 17, 1854 (10 Stat. 304), the President was authorized to exchange with the half-breeds having an interest in the tract in the then Territory of Minnesota set aside for them by the 1830 treaty and for that purpose he was authorized:

> "to cause to be issued to said persons, on the execution by them, or by the legal representatives of such as may be minors, a full and complete relinquishment by them to the United States of all their right, title, and interest, according to such form as shall be prescribed by the Commissioner of the General Land Office, in and to said tract of land or reservation, certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the said grant or reservation *pro rata* among the claimants—which said certificates or scrip may be located upon any of the lands within said reservation not now occupied by actual and *bona fide* settlers of the half-breeds or mixed-bloods, or such other persons as have gone into said Territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands, not reserved by Government, upon which they have respectively made improvements: *Provided*, That said certificates or scrip shall not embrace more than six hundred and forty, nor less than forty acres each, and provided that the same shall be equally apportioned, as nearly as practicable, among those entitled to an interest in said reservation; *And provided further*, That no transfer or conveyance of any of said certificates or scrip shall be valid."

Among those receiving scrip under the 1854 act were Ellen Angie and Anthony Renville. It is Ellen Angie's Certificate No. 379-C for 80 acres and Anthony Renville's Certificate No. 398-D for 160 acres under which Colson now claims the right to locate 240 acres of public land.

Colson filed his application to locate certain land in Florida with the scrip certificates on August 27, 1958,[1] after having been informed by the Bureau of Land Management on January

[1] The claims had been timely recorded under the act of August 5, 1955 (69 Stat. 534).

20, 1956, that the certificates were valid, not having been used for the acquisition of public lands, and that they might be used by an attorney-in-fact or a substitute attorney-in-fact. With his application he filed certain documents which he claims show a right in him to locate the land under the certificates. He thereafter twice amended his application by deleting certain land and substituting other land.

On February 26, 1959, the Eastern States land office found that the application contained an excess of 78.44 acres over the 240 acres authorized to be located under the certificates. The land office rejected the application as to so much thereof as covered lands which the office found not to be available for scrip location, leaving 144.42 acres under application. Colson was informed by that decision that his application must be amended to show that the land selected was being located in the name of the parties to whom the scrip had been issued or by their duly authorized agent on their behalf. He was further informed that he might, within 30 days, (1) offer for consideration an amendment of his application by selecting other land in place of that found not available for scrip location; (2) accept the partial rejection of his application and withdraw from the remaining lands in the application sufficient land so as to reduce the area applied for to an aggregate of 80 acres, in which event his application would be processed in connection with Certificate No. 379-C; or (3) file a withdrawal of his application, in which event his right to locate the scrip under a new application would not be prejudiced. Colson was informed that if he failed to take any of the three courses indicated his present application would be considered for processing in connection with Certificate No. 398-D and that upon acceptance of the certificate in satisfaction of the lands applied for (the 144.42 acres remaining in the application), any excess acreage remaining in that certificate would be considered as forfeited.

Colson requested reconsideration of that decision insofar as it rejected his selection of 39.91 acres in Escambia County, Florida, which the land office found had been withdrawn from all forms of disposition by Public Land Order No. 869, and stated that if this request were given favorable consideration he would substitute other acreage for the balance of the rejected acreage. That request was denied on March 18, 1959.

Thereafter on March 25, 1959, Colson amended his application to show that the application was made by him as attorney-in-fact by substitution for Ellen Angie with respect to Certifi-

cate No. 379-C for 80 acres of land and as attorney-in-fact by substitution for Anthony Renville with respect to Certificate No. 398-D for 160 acres of land and requested that any patent or patents issued for the selected lands be issued to him in that fashion. He also substituted other land for some of the land which had been rejected out of his application. On the same day he appealed to the Director from that portion of the decision of February 26, 1959, which had rejected his application as to the 39.91 acre tract.

The Director found, as indicated above, that Colson had not submitted proper evidence of his authority to locate land in the names of the scripees.

Before considering whether the Director was correct in this respect, Colson's arguments that the Director did not have jurisdiction to make the decision appealed from and that the validity of the scrip is *res judicata* will be considered.

Colson contends that as his appeal to the Director was directed solely to the question of the availability of the 39.91 acres for satisfaction of scrip rights, the Director could not consider whether the documents which Colson submitted in support of this claim are sufficient to permit him to locate land.

The argument is not sound. The Director was not limited in his consideration of Colson's appeal to the particular question raised by that appeal. The Director is charged with the administration of the various public land laws, under the general supervision of the Secretary of the Interior. He has authority, and it is his duty, to determine whether the various requirements of those laws are complied with by applicants for the public lands. He does not function only by way of appeal. He may, in the absence of an appeal, take up any matter pending in any of the land offices and dispose of it without waiting for a decision by the local office. His action in this case is not limiting himself to the question of the availability of particular lands for location under the scrip and in passing upon the merits of Colson's amended application of March 25, 1959, was entirely proper and in the interest of good administration. *Cf. Knight v. United States Land Association*, 142 U.S. 161, 176 (1891).

Colson's argument that the question of the validity of the scrip is *res judicata* encompasses not only his contention that the particular scrip certificates under which he made his application have been determined to be valid but also his contention that his credentials to exercise the rights conferred by such certificates have already been determined to be satisfactory.

As to the validity of the scrip certificates, the Director did not question them in any way. He has recognized that the certificates were issued to persons entitled to receive them under the 1854 act and that these particular certificates have not been used for the acquisition of public land. He has also recognized that the certificates may be used to locate public land by an attorney-in-fact or by a substitute attorney-in-fact of the scripees. Obviously, such recognition that the right to locate may be exercised by an attorney-in-fact cannot be considered as an adjudication of the effectiveness of powers of attorney presented to support particular certificates.

Colson's statement that the sufficiency of his credentials was reaffirmed by the decision of the Eastern States land office of February 26, 1959, is not borne out by the decision itself. At most, the decision stated that the application would be processed, if amended in the manner indicated. This meant nothing more than that the land office would take the application up for further consideration. However, even if the Eastern States land office had determined that the documents presented by Colson were such as to entitle him to locate public land thereunder, the Director would not have been estopped from reversing the Eastern States land office. The Department has a continuing jurisdiction with respect to public lands until a patent issues. The principle of *res judicata* or finality of administrative action will not be applied so as to estop the Director of the Bureau of Land Management from reversing or correcting decisions of his subordinate officers where, as here, the matter remains within the jurisdiction of the Bureau. See *United States v. United States Borax Company*, 58 I.D. 426 (1943).

We come then to the question whether Colson has established his asserted right to locate public land under the certificates.

The certificates give the scripees the right to locate designated amounts of public land. The statute itself provides that no transfer or conveyance of any Sioux Half-Breed certificate shall be valid. Because of this provision in the 1854 act, the Department has always held that the right to locate land thereunder is a personal right arising in the scripee and not subject to transfer. While it has recognized that the location may be made under a power of attorney giving the attorney authority to locate the land in the name of the scripee (see *Allen et al. v. Merrill et al.*, 12 L.D. 138, 156 (1891)), it has in the past refused to recognize locations made under such powers of attorney when it felt that the transaction was, in fact, a transfer of

the scrip. At a time when attempts were being made to locate under many of the certificates, prior to the beginning of the Twentieth Century, it refused to recognize locations under the certificates where it had evidence that the scripee had sold his certificate under an arrangement whereby the certificate was delivered to a purchaser together with two other documents, one a power of attorney to locate land under the scrip certificate and do whatever might be necessary to get a patent, and the other a power of attorney to sell and convey any land which the half-breed might thereafter acquire from the United States. Under this apparently frequently-used arrangement, both powers would be signed by the scripee in blank, with spaces left in the documents for the later insertion of the names of the attorneys and the description of the land. When the Department had knowledge of the use of this device, it refused to recognize the validity of a location made under a power of attorney to locate land. *Allen et al. v. Merrill et al.*, 8 L.D. 207 (1889). That decision was upheld on review (12 L.D. 138) and followed by the Department in other cases. The Department held in *Strong v. Pettijohn et al.*, 21 L.D. 111 (1895), that where the scrip had been, in fact, assigned by a double power of attorney, as described above, the location of the land under the scrip certificate must be canceled. See also *John W. Poe*, 29 L.D. 309 (1899).

However, the Supreme Court of Minnesota, in which State a great many of the locations were made, took a different view of these so-called double powers of attorney. When a question of title to land within the State was presented to it, the one party claiming title under a conveyance from the scripee and the other party claiming under a prior conveyance by the attorney-in-fact of the scripee whose authority was shown to include the authority to sell and convey the land, the court upheld the prior conveyance by the attorney-in-fact. The court held that the power of attorney to sell and convey could not be defeated by parol evidence that the parties intended to effect a transfer of the scrip. It held that no restraint is imposed upon the right of property in the land "after it is acquired by location of the scrip" and that a simple power to sell would extend to land subsequently acquired by means of scrip. There the land had apparently been located by one Foster under a separate power of attorney from the scripee. *Gilbert v. Thompson*, 14 Minn. 544 (1869).

In *Thompson v. Myrick*, 20 Minn. 205 (1873), affirmed on

appeal, 99 U.S. 291 (1878), Myrick was shown to have had a power to locate on behalf of the scripee which he transferred to Thompson "with a view to the location thereof for the benefit of" the scripees. Myrick and Thompson made an agreement whereby Myrick would "upon the location of the said scrip, secure the title to the land, whereon the same may be located, to be lawfully vested in the said Benjamin Thompson". Thompson located the scrip in the name of the scripees and Myrick procured deeds from the scripees to his (Myrick's) wife. The suit was concerned with the validity of the agreement between Myrick and Thompson that Myrick would secure title to the land, after location, to Thompson. The court decreed specific performance of the contract to convey the land. With respect to the location, the court said:

> "As the scrip was made non-assignable by the Act of Congress, (10 Stat. at Large, 304,) and therefore no valid transfer or conveyance of the same could be made, Myrick's relation to the scripees was that of an attorney in fact, duly authorized to locate the scrip for them. So far as the location is concerned, there is no ground for supposing that it was not made prudently, and for the best interests of Myrick's (the attorney's) principals. So far as appears in this case, Myrick's duty in his fiduciary relation to the scripees was at an end when the location was complete. As this relation was at an end upon such location, we can conceive of no reason why Myrick was not at liberty, either before or after the location was made, to enter into an agreement to secure the title (enuring from the location,) to the plaintiff upon payment of an agreed consideration. Such an agreement did not, so far as this case shows, tend to produce a conflict between Myrick's interests and his duty to *locate* the scrip to the best advantage of his principals."

In 1902, the Supreme Court of the United States, in *Midway Company v. Eaton*, 183 U.S. 602, 607, reviewed not only these decisions of the Minnesota Supreme Court but also certain decisions of the Department involving such double powers of attorney, including the *Allen* cases, *supra*. In the *Midway* case a scrip certificate had been located on land in Minnesota by Eaton, who was shown to be the scripee's attorney-in-fact for the purpose of locating the land. The Department later refused to re-

cognize the validity of the location because the scripee had at the same time executed a power of attorney to another authorizing him to enter upon and take possession of any and all pieces or parcels of land in the State of Minnesota which he then owned or might thereafter acquire or become interested in, by virtue of the location of the scrip in question, and to convey the land. The Department held this to be an assignment of the scrip, in violation of the statute (*Hyde et al. v. Eaton et al.* (On Review), 12 L.D. 157 (1891)), and issued a patent to the land covered by the location to another. Title to the land under the scrip location had, by mesne conveyances, become vested in Eaton. The Supreme Court of Minnesota upheld Eaton's title to the land over that of the subsequent patentee of the United States, holding that the scripee, or her successors in interest, could not be deprived of their rights in the land by the assumption of a supervisory power by the officials of the land department (82 N.W. 861 (1900)).

When the case came before the United States Supreme Court, it said that the controversy turned upon the validity of the scrip locations and found that the locations were valid. It held that it was error for the Department to have held that the locations made by Eaton were invalid and to have canceled the entries. It held that title to the land passed to the scripees by virtue of the locations.

As we understand the decision of the United States Supreme Court, it held, in effect, that this Department should not refuse to recognize locations made under powers of attorney even though it had evidence that the Indian had by another document either conveyed the land prior to location or vested in another the right to convey the located land. In other words, where the location was shown to have been made under a valid power of attorney to locate given by the scripee the fact that the scripee may have also conveyed the land to another by means of a blank quitclaim deed prior to location or given another (without naming him) a power of attorney to convey the land upon its location did not make the transaction a transfer of scrip within the prohibition of the 1854 act. In all of the cases which the court reviewed, however, there was a valid location of the land, or at least, as the court said with respect to its decision in *Felix v. Patrick*, 145 U.S. 317 (1892), no question as to the validity of the location was raised.

The Director held that the documents presented by Colson do not show authority vested in him to locate land for either of

the scripees.

We have examined the documents and agree that Colson has not presented any evidence of a power vested in him to locate land in the name of either of the scripees under the scrip certificates.

The so-called Guarantees whereby the W. E. Moses Land Scrip and Realty Company guaranteed the validity of the certificates and sold the Ellen Angie scrip certificate No. 379-C to Colson for $6,000 and the Anthony Renville Certificate No. 398-D for $13,600 are, of course, ineffective as transfers of any rights to locate covered by the certificates in view of the prohibition in the 1854 act against the transfer or conveyance of the scrip.

The quitclaim deed dated May 19, 1915, signed by Ellen Angie Williams does nothing more than to convey to Colson any title which she might have or thereafter acquire *by location* of her certificate. It does not vest in Colson any authority to locate land in the scripee's name.

The power of attorney by substitution which Colson holds from Jesse L. Linn with relation to the Ellen Angie scrip shows nothing more than that Ellen Angie by power of attorney dated February 21, 1910, authorized Linn to enter upon and take possession of any and all lands in which she might be interested *by virtue of the location* of her scrip and further authorized Linn to sell and convey

> "any and all lands already located with said scrip, or any part or parts thereof; and any and all lands which she would thereafter acquire or become seized of and which she should thereafter become interested in *by virtue of the location* of said scrip ***". (Emphasis supplied.)

The power of attorney by substitution which Colson has presented further recites that the original power of attorney was by its terms made irrevocable and authorized Linn to appoint a substitute or substitutes to do and perform on behalf of and in the name, place, and stead of Ellen Angie Williams, formerly Ellen Angie,

> "any and all of the acts which the said attorney in fact was, by said instrument, authorized to perform; as more fully appears by the said instrument, which is hereto attached and made a part hereof."

No power of attorney from Ellen Angie Williams was attached to this document when it was presented by Colson in support of his application. As the Director pointed out, Colson has presented nothing, except the statement contained in the power of attorney by substitution, to show that Jesse L. Linn had, in fact, been appointed to act in any capacity for Ellen Angie in relation to the scrip. Further, the power of attorney by substitution authorizes only the management and sale of land to be obtained by location of the scrip.

On appeal, Colson states that certificate No. 379-C was accepted by the Department when Jesse L. Linn, as attorney-in-fact, filed an application for the location of the scrip on specific lands in Wyoming. He states that, for reasons not involving the validity of the scrip or the credentials under which it was presented to the Department, the application to locate the Ellen Angie scrip was rejected since the Governor of Wyoming had applied for the same land under another act of Congress some three months earlier, and that, having been informed of that fact by the General Land Office, Linn thereupon waived his right to prosecute the location. Thereafter, on March 12, 1912, the General Land Office, after making reference to the fact that Linn had waived his right to prosecute the application, canceled the location and ordered the scrip delivered to the party entitled to receive it. The scrip was mailed to E. E. Lonabaugh at the direction of Linn (Appellant's Supplemental Brief, pp. 16-18). Colson seems to argue from this that as Linn was recognized by the Department in 1911 as attorney-in-fact for Ellen Angie with authority to locate land under the scrip the substitute power of attorney which Linn gave to Colson must be recognized as vesting in Colson the authority to locate land under the scrip. This does not follow. Linn apparently had a power of attorney from Ellen Angie *to locate the scrip* (see Appellant's Exhibit I) in addition to any authority which he may have had from her to deal with the land and convey it after location. In any event, the Department did not, with respect to that attempt to locate land not then available for location, adjudicate Linn's right to act for Ellen Angie in the matter of the location of her scrip.

Nor do the documents which Colson has presented in support of his asserted right to locate land under the Anthony Renville certificate place him in any better position with respect to the 160 acres covered by Certificate No. 398-D.

He has the "Guarantee" which, as pointed out above, is

meaningless insofar as showing any authority in Colson to locate land in the name of Anthony Renville.

He also has a document, dated June 10, 1914, signed by Anna R. Kean, which recites that

> "Anthony Renville or the heirs and legal representatives of Anthony Renville, by Anna R. Kean, a Commissioner of Court, duly appointed for the purpose, have made, constituted and appointed, and by these presents do make, constitute and appoint Barney R. Colson *** our true and lawful attorney, for us, or each of us individually, and in our name, place and stead, to enter upon, and take possession of any and all pieces and parcels of land or the timber or other materials thereon in the State of _____ which we own, or which we may hereafter acquire or become seized of, or in which we may now or hereafter be in any way interested: under and by virtue of location of Sioux Half Breed Scrip No. 398 Letter D, for 160 acres, issued to the said Anthony Renville under the Act of July 17, 1854, *** ."

The further recitations in this document are much like those contained in the substitute power of attorney presented in connection with the Ellen Angie scrip. While the document (obviously executed in blank as was the quitclaim deed from Ellen Angie) authorizes Colson to enter upon and take possession of any land which Renville or his heirs or legal representatives may own or thereafter acquire or become seized of or in which they may be interested under and by virtue of the location of Sioux Half Breed Certificate No. 398-D and to sell such land and give conveyance in their names, it does not contain any authority to locate land under the scrip certificate.

On appeal, Colson contends that this document must be recognized as vesting in him the right to locate under the Anthony Renville certificate because Anna R. Kean obtained title to certain lands within the beds of dried-up lakes by location of Sioux Half-Breed scrip through powers of attorney authorizing John S. Newman as attorney-in-fact to locate said scrip and to convey the lands located to Anna R. Kean. Colson states that patents were issued to the scripees, including Anthony Renville, but that the patents were subsequently canceled as the result of

a suit which went to the United States Supreme Court.[2] He states that upon cancellation of the patents under which Kean claimed and as a result of a decree issued by an Indiana court Anna R. Kean was appointed a commissioner of the court to execute duplicate powers of attorney to locate the scrip in the names of the scripees and to receive patents therefor as well as to convey the same when located and patented. He states further that in a decision dated April 29, 1914, the First Assistant Secretary of the Interior held that any new locations would have to be made in the names of the scripees but that the person who bought the lands should be recognized as having the equitable right to control the locations. This latter concession was on the supposition that the scripees had sold or attempted to sell the lands embraced in the former locations. He also refers to what he terms a similar situation in which, he says, the scrip of Elizabeth Conklin (No. 10-C) was located through Anna R. Kean as attorney in fact. He states that in locating the Elizabeth Conklin scrip Anna R. Kean, through a substitute power of attorney, appointed one Perez as the substitute attorney-in-fact to do the actual location and to receive the patent on the lands so located, and that the power of attorney by which that location was made is identical to the power of attorney submitted by him as substitute attorney-in-fact for Anthony Renville (Appellant's Supplemental Brief, pp. 18-21; Exhibits J, K, L, and M; and the additional exhibit referred to in fn. 4 (p. 20) of Appellant's Supplemental Brief).

The decision of April 29, 1914 (*Anna R. Kean*, D-29200), was the result of an application made by Anna R. Kean for the delivery to her of nine pieces of Sioux Half-Breed scrip. The decision sets forth Kean's argument that inasmuch as she had paid valuable consideration for the lands, title to which failed, she was entitled to have possession of the scrip for purposes of relocation. While that decision does not recognize the decree of the Indiana court, under which Anna R. Kean was decreed to be entitled to relocate this scrip, as binding on this Department, it nevertheless held

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[2] *Kean v. Calumet Canal and Improvement Company*, 190 U.S. 452 (1903). There the court held that the canal company's title to the beds of the lakes, derived through the State of Indiana under the Swamp Land Act of September 28, 1850, (43 U.S.C., 1958 ed., sec. 981 *et seq.*), was superior to that of Kean, because the United States, having conveyed the land to the State, had no jurisdiction to make a second survey, upon which the Kean title rested.

"*** where a person has purchased land so located and patented under this class of scrip, and the title has failed because the Government had already disposed of the land, such purchaser should be permitted to govern the use of the scrip for the purpose of making a new selection. Of course, the new selection would have to be in the name of the scripee, as was the former one."

Following that decision the nine pieces of scrip, including that of Elizabeth Conklin, were returned to the attorney for Anna R. Kean.

However, the record of the Department with respect to the second location of the Elizabeth Conklin Scrip No. 10-C does not bear out Colson's contention that the power of attorney under which that location was made is identical with the power of attorney which Colson has submitted. That record[3] contains a power of attorney reading in pertinent part:

"THAT Elizabeth Conklin, or the heirs, devisees and legal representatives of Elizabeth Conklin, by Anna R. Kean, a Commissioner of Court, duly appointed for the purposes hereinafter set forth, have made, constituted and appointed, and by these presents do make, constitute and appoint E. A. Perez of Austin, Nevada_____true and lawful attorney for her or them and in her or their name, place and stead *to select and locate*, at any Land office in the United States, the lands to which she or they may be entitled by reason of_____'Sioux Half-Breed Lake Pepin Reserve Scrip,' to-wit: Number Ten (10) C for 80 acres. Said scrip being granted and issued to said Elizabeth Conklin, in accordance with the provisions of an act of Congress approved July 17, 1854, *** and *on such location* to ask for and receive the Patent therefor; hereby declaring all lawful acts of her or their said Attorney in the premises, of the same valid and binding force as if done personally by her on them. And she or they further ordains and declares that the said E. A. Perez is hereby irrevocably vested with all such power and authority as she or they might or could exercise personally if present and acting; hereby ratifying and confirming whatsoever_____

[3]Colson submitted certified copies of selected documents from that record.

said Attorney may lawfully do in the premises." (Emphasis supplied.)

The power of attorney submitted in support of the right to locate the Elizabeth Conklin scrip is thus vastly different from the power of attorney submitted by Colson. It vests Perez with the authority *to select and to locate* the land to which Elizabeth Conklin may be entitled by virtue of Certificate No. 10-C. No such authority is vested in Colson by the power of attorney which he holds from Anna R. Kean.

Because of Colson's insistence that powers of attorney such as he holds have been recognized as vesting in the holder authority to locate under a scrip certificate, Colson was, by letter of May 17, 1963, to his attorneys, given a further opportunity to support his contention. Colson's response to this invitation, in the form of a further supplemental brief, is not helpful to his position.

He points to the fact that the use of powers was not the only way in which scrip claims were satisfied and that many scrip claims were exercised by guardians whose appointment, it appears, was for the sole purpose of making the claim. Obviously powers of attorney were not used in exercising some of the rights granted by the 1854 act, as many of the scripees exercised the right to locate the land themselves. As to the use of guardians, it is sufficient to point out that many of the scripees were minors, incapable of acting for themselves in the matter.[4]

Colson contends with respect to the Anthony Renville scrip that Anna R. Kean, following the departmental decision of April 29, 1914, transferred her complete rights arising under or flowing by reason of Certificate No. 398-D and the Department's decision to him, that the document which he has submitted is inclusive of all of Kean's rights to control the new location, and that no adverse documents, powers, or conveyances as to this certificate exist. The fact that Colson may not be able to produce such a document does not, of course, prove that such a document may not have existed at one time. The

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[4]Scrip Certificate No. 582A to E, issued to Philamon Provencial and referred to by Colson in his supplemental brief, shows on its face that the scripee was "of about the age of seven years". Two other certificates, also referred to by Colson, show the scripees to have been of an age of about four months (scrip Certificate No. 10A to E, Elizabeth Conklin) and six months (scrip Certificate No. 416 A-E, Eliza Latramboise).

fact that Kean, in the Conklin case discussed above, did specifically appoint another to make the location for her suggests at least the possibility that she did so in this instance.

Colson also contends that the Department in three other "Kean" cases recognized that no authority other than the Department's 1914 decision need exist so long as the application is for a patent to be issued in the name of the Indian and/or his heirs. This contention, too, fails when the records referred to by Colson are examined.

Thus in Gainesville 016950, involving the Philamon Provincial scrip, and in Phoenix 042691, involving the Elizabeth Conklin scrip No. 10-E, applications to locate were signed by Anna R. Kean. Also in Gainesville 016949, involving an attempted second location of the Eliza Laframboise scrip, Anna R. Kean herself signed the application to locate. However, no patent has been issued on the basis of that application.

It is clear that Colson has not shown any right in himself to locate public lands under either of the scrip certificates.[5]

In view of the fact that Colson has not established his right to locate public lands under the certificates, it becomes unnecessary to consider the Director's additional holding or Colson's arguments that certain of the lands which he applied to select are available for selection in satisfaction of the outstanding scrip rights.

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[5]Colson's arguments in his latest brief that he is not a "Johnny-come lately" or "speculator" in his claims is not impressive. He admits that he bought the claims in 1925 – after the rights granted by the certificates had been outstanding for almost seventy years – for $19,600 and asserts that on the basis of today's dollar plus the cumulative value of interest in terms of today's dollar this would result in a total value applicable to the consideration he paid for the claims in terms of today's dollar value of not less than $250,000!

He asserts that if his claims are denied, he will be the only one to suffer, to the extent of $250,000, and that the Department has no right to inject itself into the matter as an adverse party. What Colson overlooks is the obligation of the Department to see that the public lands are disposed of only in the manner prescribed by Congress.

His reference to the Department's proposed legislation "To provide for the satisfaction of claims arising out of scrip, lieu selection, and similar rights" (S. 975, 88th Cong., 1st Session) overlooks the fact that the proposal would permit the Secretary of the Interior to "convey the selected lands if he finds them to be proper, under existing law, for such disposition, and if the claim upon which an application is based is determined to be valid."

Therefore, purusant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4) (a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

s/s Ernest F. Hom
Assistant Solicitor
Land Appeals

APPENDIX H

PUBLIC LAW 88-545
(ACT OF AUGUST 31, 1964) 78 Stat. 751

LAWS OF 88TH CONG.–2ND SESS.

SCRIP, LIEU SELECTION, ETC.–SATISFACTION OF CLAIMS

For Legislative History of Act, see p. 3330

PUBLIC LAW 88-545; 78 STAT. 751

[H. R. 4149]

An Act to provide for the satisfaction of claims arising out of scrip, lieu selection, and similar rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Except for military bounty land warrants, all claims and holdings recorded under the Act of August 5, 1955 (69 Stat. 534,535),[45] which are not satisfied in one of the ways hereafter set forth, shall become null and void on the later of the two following dates: (a) January 1, 1970, or, in the case of soldiers' additional homestead claims, January 1, 1975; (b) at the termination of any transaction initiated pursuant to this Act.

Sec. 2. Prior to July 1, 1966, holders of claims recorded under the Act of August 5, 1955, may apply to the Secretary of the Interior to have conveyed to them, in satisfaction of their claims, such lands as they may, in their applications, designate. The Secretary shall thereafter convey the selected lands if he finds them to be proper, under existing law, for such disposition, and if the claim upon which an application is based is determined to be valid. As used in this Act, the terms "lands" and "land" include any rights or interests therein.

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[45] 43 U.S.C.A. § 274 note.

Sec. 3. (a) Prior to January 1, 1967, the Secretary shall classify, for conveyance and exchange for each type of claim recorded under the Act of August 5, 1955, public lands in sufficient quantity so as to provide each holder of such a claim with a reasonable choice of public lands against which to satisfy his claim. The public lands so classified shall be of a value of not less than the average fair market value, determined by the Secretary as of the date patent issued, of those public lands actually conveyed in exchange for each type of claim since August 5, 1955.

(b) Holders of recorded claims may apply for reasonably compact areas of lands so classified, and, upon his determination that the claim upon which an application is based is valid, the Secretary shall convey such lands to the applicant.

Sec. 4. Prior to January 1, 1968, the Secretary shall, by registered mail or certified mail sent to the address of record of each person having an unsatisfied claim, offer in satisfaction of such claim lands of a value of not less than the average fair market value of those public lands actually conveyed in exchange for each type of claim since August 5, 1955. Fair market value shall be determined in the manner prescribed in section 3 of this Act. Upon acceptance of the offer, the Secretary shall convey the lands to the claimant, if he determines that the claim is valid.

Sec. 5. In respect of any type of claim recorded under the Act of August 5, 1955, not more than three conveyances of public lands in exchange for which have taken place since that date, the Secretary shall determine the type of claim which it most nearly resembles, and at least four conveyances in exchange for which has taken place since August 5, 1955, and shall, for the purposes of this Act, treat it in all respects as if it were such type of claim.

Sec. 6. Prior to January 1, 1970, or, in the case of soldiers' additional homestead claims, January 1, 1975, any person who has a claim recorded pursuant to the Act of August 5, 1955, by written notice to the Secretary of the Interior, or any officer of the Department of the Interior to whom authority to receive such notice may be delegated, may elect to receive cash instead of public land in satisfaction of his claim, at a rate per acre equal to the average value of the lands offered by the Secretary under section 4 of this Act. Upon a determination that the claim is valid, the Secretary or his delegate shall certify the claim to the Secretary of the Treasury who is authorized and

directed to pay the claim out of any money in the Treasury not otherwise appropriated. Acceptance of the money shall constitute a full and complete satisfaction of the claim or holding for which the money is paid: *Provided*, That no agent or attorney acting on behalf of another to procure a payment under this Act shall demand, accept, or receive more than 10 per centum of the payment made, and any agreement to the contrary shall be null and void.

Approved August 31, 1964.

APPENDIX I

ACT OF JULY 17, 1854

10 Stat. 304

July 17, 1854

CHAP. LXXXIII. – An Act to authorize the President of the United States to cause to be surveyed the tract of land in the Territory of Minnesota, belonging to the half-breeds or mixed-bloods of the Dacotah or Sioux nation of Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized, to exchange with the half-breeds or mixed-bloods of the Dacotah or Sioux nation of Indians, who are entitled to an interest therein, for the tract of land lying on the west side of Lake Pepin and the Mississippi River, in the Territory of Minnesota, which was set apart and granted for their use and benefit, by the ninth article of the Treaty of Prairie du Chien, of the fifteenth day of July, one thousand eight hundred and thirty; and for that purpose he is hereby authorized to cause to be issued to said persons, on the execution by them, or by the legal representatives of such as may be minors, of a full and complete relinquishment by them to the United States of all their right, title, and interest, according to such form as shall be prescribed by the Commissioner of the General Land-Office, in and to said tract of land or reservation, certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the said grant or reservation *pro rata* among the claimants – which said certificates or scrip may be located upon any of the lands within said reservation not now occupied by

Authority to exchange lands on west side of Lake Pepin and Mississippi River.

Vol. 7, p. 830.

actual and *bona fide* settlers of the half-breeds or mixed-bloods, or such other persons as have gone into said Territory by authority of law, or upon any other unoccupied lands subject to preemption or private sale, or upon any other unsurveyed lands, not reserved by Government, upon which they have respectively made improvements: *Provided*, That said certificates or scrip shall not embrace more than six hundred and forty, nor less than forty acres each, and provided that the same shall be equally apportioned, as nearly as practicable, among those entitled to an interest in said reservation: *And provided further*, That no transfer or conveyance of any said certificates or scrip shall be valid.

Proviso.

Further proviso.

When certificates or scrip to issue.

Sec. 2. *And be it further enacted*, That the President be, and he is hereby authorized, to cause to be ascertained the number and names of the half-breeds or mixed-bloods who are entitled to participate in the benefits of the said grant or reservation as aforesaid, before the issue of the certificates or scrip provided for in the preceding section.

Lands to be surveyed: how exposed to sale.

Sec. 3. *And be it further enacted*, That from and after the passage of this act, the President is authorized to have the lands within the said reserve surveyed and exposed to public sale at the Land-Offices for the districts in which said lands may lie, according to the boundaries of the several land districts recently established by Congress, in the same manner as other public lands.

APPROVED, July 17, 1854.

APPENDIX J

DECISION D-29200 (INTERIOR) **April 29, 1914**

* * * * * * *

K
367929

Anna R. Kean **Instructions in Re application for return of Sioux Half-breed Scrip**

SUBMITTED BY THE GENERAL LAND OFFICE

December 22, 1913, the Commissioner of the General Land Office submitted for Departmental consideration the application of Anna R. Kean for the delivery to her of the pieces of Sioux Half-breed scrip and for the recognition of her claim to three soldiers' additional homestead rights.

By departmental letter of February 9, 1914, the attorney for Mrs. Kean was advised with reference in the said soldiers' additional homestead claims and a copy of the letter in with the record for the information of the Commissioner.

The said pieces of scrip were issued by the Commissioner of Indian Affairs under the provisions of the Act of July 17, 1854 (10 Stat. 304) and by the terms of the law governing the issuance thereof, such scrip is not assignable. The pieces here under consideration were located through powers of attorney for certain lands in the State of Indiana which formed the beds of certain lakes which upon recession of the waters, the Department surveyed as public lands of the United States. Patents were issued but in the case of *Kean v. Calumet Land Company*, 190 U.S. 468, the Supreme Court of the United States held that title to [37] these lands passed with the disposal of the surrounding lands, and therefore the United States had no authority to issue patents or allow the locations mentioned. This nullified the location and patents under which Kean claimed. She now urges that inasmuch as she paid valuable consideration for these lands, the title to which failed, she is entitled to have possession of this scrip for the purpose of relocation.

The Commissioner in transmitting the case to the government for instructions, expressed the view that these pieces of scrip

should be returned to the scripees or their legal representatives. Filed with the application is a certified copy of a decision by the Circuit Court of Lake County, Indiana, which decreed that Anna R. Kean was entitled to relocate this scrip inasmuch as the prior location had failed. It recited that the defendants, the scripees, and attorneys-in-fact, who had been empowered by the scripees to make locations, had been served with copies by publication. It was held that the contracts for the location of the scrip between Anna R. Kean and the descendants mentioned in the decree were left unfulfilled as expressed by the powers of attorney to make the location and to execute conveyance of the land to her and that said contracts being specific and for a valuable consideration and for her benefit, remained in full force and effect and that said certificates or scrip should be returned to her so that other land could be located in lieu of those erroneously located under such powers of attorney. Accordingly, the Court appointed Anna R. Kean Commissioner of the Court to apply for and receive from the [38] Commissioner of the General Land Office all of said certificates or duplicates thereof.

The Commissioner referring to said Court decree expressed the view that it was not binding upon the Land Department and with this view, the Department agrees that the said Court did not have jurisdiction to render such a decree.

Formerly this Department took the position that the method employed in the location of this class of scrip through powers of attorney authorized location of scrip and also granting power to sell the land so located were in violation of the law which specifically denied the right of transfer, that this method merely operated to permit that to be done indirectly which the law did not permit to be done directly, but this position was not upheld by the Supreme Court. It has been thoroughly established that this practice is not inhibited by the law. See *Myrick v. Thompson* (99 U.S. 291); *Midway Co. v. Eaton*, (183 U.S. 602).

In view of the holding of the Court, it would appear that where a person has purchased land so located and patented under this class of scrip and the title has failed because the Government had already disposed of the land, such purchaser shall be permitted to govern the use of the scrip for purposes of making a new location. Of course, the new selection would have to be in the name of the scripee as was the former one. The case of Joseph Gardepie (Vol. 2 C.L.D. 1354, Ed. 1892), was much like the present case. There, one McDonnell had located the

scrip under power of attorney from the scripee. He had also [39] purchased the land through Lowell who had power of attorney from the scripee authorizing such sale. The location failed by reason of a prior entry. The Department held that the scrip should be returned not to the scripee but to McDonnell or his legal representative who was the only one who suffered loss by failure of the location as he had given valuable consideration to Lowell for the deed and the scripee had been fully paid. It was held that the attempted transfer of the land did not effect a transfer of the scrip but that McDonnell or his legal representatives were entitled to possession of the scrip by virtue of the power under which the attempted location was made. The argument, however, shows that the controlling reason for returning the scrip to McDonnell or his legal representatives was that he had paid value for the land located therewith, the title to which had failed. It was stated:

> The only loser by the failure of location then was McDonnell, and it would seem only equitable that the scrip should be placed where McDonnell or his estate might not suffer loss on account thereof and might be enabled to repair to some extent the loss already sustained.

I am clearly of opinion that this is the proper course. Any new location will have to be made in the names of the scripees but the person who bought the lands should be recognized as having the equitable right to control the locations. This is upon the supposition, however, that the scripee sold or attempted to sell the lands embraced in the former locations and of this there is no sufficient evidence. It is stated by Mrs. Kean's attorney that he has in his possession deeds from the Indians to Anna R. Kean of Indian lands. Upon filing satisfactory evidence of this character, [40] the Commissioner will deliver the scrip to Anna R. Kean or her duly authorized attorney.

The record is returned herewith.

(signed) A. A. Jones
First Assistant Secretary

APPENDIX K

UNITED STATES CONSTITUTION

* * * * * * * * * * *

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * * * * * * * *

APPENDIX L

UNITED STATES CODE

TITLE 5

ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

CHAPTER 7 – JUDICIAL REVIEW

Sec.
701. Application; definitions
702. Right of review.
703. Form and venue of proceeding.
704. Actions reviewable.
705. Relief pending review.
706. Scope of review.

§701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that–

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter–

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include–

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or

sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including action for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing

court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

* * * * * * * * * * *

APPENDIX M

Fifth Circuit Notice Withholding Decision Pending Certiorari in *State of Washington v. Udall*, 417 F.2d 1310, 9 Circuit, 1969, and Solicitor General Notice Not To Seek Certiorari Therein

Mr. Richard Hildreth
Attorney at Law
Securities Bldg., 5th Floor
729 Fifteenth St., N.W.
Washington, D.C. 20005

March 26, 1970

Re: No. 26212 – *Barney R. Colson, et al, vs. Walter J. Hickel*, etc.

Gentlemen:

At the direction of the court I am writing to advise that the decision in the above referenced case is being withheld pending disposition of certiorari in *State of Washington vs. Udall*, 417 F.2d 1310, 9 Cir., 1969.

As soon as a decision is rendered in this court in this case, a copy of the printed opinion will be forwarded to you.

Very truly yours,

Edward W. Wadsworth, Clerk

by Lydia G. Comberrel

LGC:cms

cc: Mr. Edward F. Boardman
Hon. Ramsey Clark
Mr. Herbert Pittle
Mr. Roger P. Marquis
Mr. Shiro Kashiwa

SBH:HP
90-2-18-93
AIR MAIL

May 18, 1970

Edward W. Wadsworth, Clerk
United States Court of Appeals
Fifth Circuit
Room 408-400 Royal Street
New Orleans, Louisiana 70150

Attention: Lydia C. Comberrel

Dear Mr. Wadsworth:

This will refer to your letter of March 26, 1970, to Mr. Richard Hildreth, attorney for the appellant, in the case entitled *Barney R. Colson v. Walter J. Hickel*, No. 26212.

A copy of your letter was received in this Department and counsel were informed that the decision in this case is being withheld pending disposition of certiorari in *State of Washington v. Udall*, 417 F.2d 1310.

The Solicitor General has decided not to seek certiorari in the *State of Washington* case.

Sincerely,

Shiro Kashiwa
Assistant Attorney General
Land and Natural Resources Division

by S. Billingsley Hill
Chief, Appellate Section

Herbert Pittle, Attorney

cc: Mr. Richard Hildreth
1225 Connecticut Ave., N.W.
Washington, D.C. 20036

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 975

BARNEY R. COLSON, ET AL., PETITIONERS

v.

WALTER J. HICKEL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 428 F. 2d 1046. The district court's findings of fact and conclusions of law are reported at 278 F. Supp. 826 (Pet. App. E).

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1970 (Pet. App. B). A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on August 17, 1970 (Pet. App. C). The petition for a writ of certiorari was filed November 16, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

411-863—70

QUESTION PRESENTED

Whether a suit to compel the Secretary of the Interior to issue a patent to particular public lands of the United States is an unconsented suit against the United States when the Secretary, in rejecting the claim, was acting within the valid delegation of a constitutional statute.

STATEMENT

Petitioners seek to compel the Secretary of the Interior to issue patents on a designated 240 acres of public lands of the United States. They purport to exercise powers of attorney which they claim entitle them to obtain public land on behalf of holders of Indian scrip issued in the latter half of the nineteenth century. The validity of the scrip itself is not in issue. It was issued pursuant to a statute which provided that "no transfer or conveyance of any of said certificates or scrip shall be valid." Act of July 17, 1854, 10 Stat. 304 (Pet. App. J2). Petitioners acquired the scrip, together with substitute powers of attorney[1] authorizing them "to enter upon and take possession of any and all lands * * * in which * * * [the Indians are] entitled or interested, and to enter upon and take possession of any and all lands which * * * [the Indians] should thereafter acquire or become seized of" (Pet. App. E2–3).[2]

---

[1] The original powers of attorney were never presented to the Secretary in connection with this claim (Pet. App. G9–10).

[2] The history of the scrip and the transactions through which it and the substitute powers of attorney came into petitioners' possession are set forth fully by the court of appeals (Pet. App. A2–5).

Petitioners' application for patents was rejected by the Secretary of the Interior after the usual administrative review process. The ground for denial was that the powers of attorney were insufficient to support the claimed scrip rights because they did not authorize petitioners to locate the lands to be acquired in the name of the scripees (Pet. App. G5–15). Petitioners then brought this suit in the district court. That court upheld the Secretary's decision that the powers of attorney did not confer upon petitioners the right to locate lands under the scrip certificates in the name of the scripees. The court further held that the powers no longer were valid because all of the original scripees were presumably dead. It reasoned that the powers of attorney were revoked by these deaths, unless they were coupled with an interest, but that they could not validly be coupled with an interest because transfer or conveyance of the scrip was prohibited. The court concluded also that the suit was against the United States, which was not a party and had not waived its sovereign immunity, and that the suit was barred by laches (Pet. App. E5–6). The court of appeals affirmed on the ground that the action was an unconsented suit against the United States and therefore barred by sovereign immunity (Pet. App. A7–9).

ARGUMENT

1. The decision of the court of appeals that the relief sought is barred by sovereign immunity is correct. There is, moreover, no genuine conflict among the circuits on this issue. Review by this Court is therefore not warranted.

This suit is essentially an action in the nature of mandamus to compel the Secretary of the Interior to issue patents to public land of the United States. It is clearly a suit in which the "defendant is asked to transfer * * * title of property which is the Government's." *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 712 (Frankfurter, J., dissenting). The consent of the sovereign therefore is "a prerequisite to the grant of judicial remedies," *ibid.*, unless the Secretary's refusal to act either was "beyond [his] statutory powers * * * [or] even though within the scope of [his] authority * * * was constitutionally void." *Dugan* v. *Rank*, 372 U.S. 609, 621–622; *Malone* v. *Bowdoin*, 369 U.S. 643, 647; *Larson* v. *Domestic & Foreign Corp.*, *supra*, at 702.[a]

---

[a] Petitioners seek to distinguish *Dugan*, *Malone* and *Larson* on the ground that they were "original" actions and did not arise in the context of administrative decisions. Petitioners rely on the Administrative Procedure Act as conferring a right to judicial review. Plainly, however, whether sovereign immunity prevents judicial review of government action depends not upon whether that action may be characterized as administrative, but, rather, upon the nature of the relief sought. The review provisions of the Administrative Procedure Act do not effect a waiver in all cases of the well-established doctrine of sovereign immunity. See *Blackmar* v. *Guerre*, 342 U.S. 512, 515–516. As the court held in *State of Washington* v. *Udall*, 417 F. 2d 1310 (C.A. 9), upon which petitioners heavily rely for their assertion of a conflict among circuits, "[t]he Administrative Procedure Act may * * * provide a basis for review of governmental decisions if, and only if, the immunity doctrine is not so controlling so as to bar the suit." *Id.* at 1320. There is no conflict between this case and *State of Washington* for there the court found that plaintiffs' contention was that the Secretary of the Interior was acting outside the scope of his authority. *Id.* at 1316.

The Secretary's refusal to issue patents was not within either of the exceptions to sovereign immunity. The court of appeals properly concluded that "[t]he matter of the issuance of patents was clearly within the valid statutory authority of the Secretary of the Interior" (Pet. App. A9). Petitioners' contention is essentially that the Secretary made "an erroneous judicial interpretation * * * with respect to [their] legal rights" (Pet. 11). They do not, and could not, assert that the Secretary is without power to pass on the validity of scrip, powers of attorney, and other documents claimed to invest individuals with property rights. And it has long been established that there is no jurisdiction, absent consent, where the complaint is merely that a decision is "incorrect * * * as to law or fact, if the officer making the decision was empowered to do so. * * *" *Larson* v. *Domestic & Foreign Corp., supra,* at 695.

Petitioner does not argue that the statute under which the Secretary acted is unconstitutional. He does contend that the Secretary's action takes property rights without just compensation. Even if this were true, however, it would not render the action of the Secretary void. It would, instead, entitle the petitioner to bring suit for compensation or damages against the United States. Such a suit would be within the jurisdiction of the Court of Claims, not the district court. See 28 U.S.C. 1346(a)(2), 1491; *Dugan* v. *Rank, supra,* at 611; *Armstrong* v. *United States,* 364 U.S. 40; cf. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity,* 77 Harv. L. Rev. 1, 38–39.

2. The decision of the Secretary and the district court on the merits was, in any event, correct. The statute under which the scrip was issued prohibited its transfer or conveyance (Pet. App. 12). In *Midway Co.* v. *Eaton*, 183 U.S. 602, this Court held that execution of powers of attorney conferring power to "select and locate" land in the name of the holder of scrip and, subsequently, to sell the land selected, did not violate the proscription of transfer of the scrip itself. The powers of attorney here do not, however, confer the right to "select and locate" land on behalf of the holder of scrip. Rather, they confer the right "to enter upon, and take possession" of lands to which the holders of scrip are entitled.

The Secretary was not in error in holding petitioners to the literal terms of the powers of attorney. Cf. *Udall* v. *Battle Mountain Co.*, 385 F. 2d 90 (C.A. 9), certiorari denied, 390 U.S. 957. They can claim no legal or equitable interest in the scrip itself, although they claim an interest in the land selected. The scrip does not, of course, invest holders with rights to any particular portion of public land. See *Hopkins* v. *United States*, 414 F. 2d 464, 467–468 (C.A. 9); *Finch* v. *United States*, 387 F. 2d 13, 15–16, (C.A. 10), certiorari denied, 390 U.S. 1012; *Carl* v. *Udall*, 309 F. 2d 653, 656 (C.A.D.C.). There must first be selection. Since there was none here and can be none by these petitioners under a literal reading of the powers, there is simply no property which they can "enter upon and take possession" of.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SHIRO KASHIWA,
Assistant Attorney General.

EDMUND B. CLARK,
HERBERT PITTLE,
Attorneys.

DECEMBER 1970.

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IN THE

Supreme Court of the United States

October Term, 1970

No. 975

BARNEY R. COLSON, ET AL,
Petitioners,

v.

WALTER J. HICKEL, Secretary of the Interior
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

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THE CASILLAS PRESS, INC. - 1717 K Street, N.W. Washington, D.C. - 223-1220

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IN THE

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BARNEY R. COLSON, ET AL.,
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WALTER J. HICKEL, Secretary of the Interior,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

The Petitioner, Barney R. Colson, et al., respectfully moves this court for an order vacating its denial of the Petition of Certiorari, entered on February 22, 1971, and requests that this Court grant the said petition. Petitioner submits that there are special and important reasons for the requested action and that a subsequent decision of this Court supports the request.

Petitioner Has Been Deprived Of Access To The Courts

This Court has always viewed with deep concern any denial of access to the Courts. It has jealously guarded the right of the people of the United States to judicial review of arbitrary actions of the Executive Branch of Government in the administration of Federal laws, particularly where there are no alternate avenues of redress.[1] This Court has uniformly held that access to judicial review of the administrative process is necessary in order to satisfy the demands of due process *Yakus v. United States* 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944).

Petitioner has been denied judicial review of an administrative decision of a Federal Officer The Secretary of the Interior. That right was denied by the lower Court and the Fifth Circuit solely on the theory of sovereign immunity.[2] That denial is in direct conflict with decisions of at least three other circuits as well as with decisions of this Court.

The ninth Circuit, as well as the Tenth and District of Columbia Circuits, have consistently reviewed decisions by the Secretary of the Interior in his administration of the public land laws. None applied the doctrine of

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[1] Petitioner has no alternate remedy. Further, the denial of access to the Courts permits the Federal Government, by the action of its agent, the Secretary of the Interior, to dishonor obligations established by the Congress.

[2] As discussed *infra* the Secretary's decision was limited to the threshold question of the legal meaning of certain documents and the powers and rights which the documents gave to Colson. It never involved even the remotest suggestion of areas that would raise a question of sovereign immunity. *Barney R. Colson*, 70 I.D. 409 (1963).

sovereign immunity to preclude review where the Secretary's action was the result of an administrative proceeding pursuant to the public land laws. This court and every Circuit Court except the Fifth has properly treated the decision of the Secretary as an agency action reviewable under the provisions of the Administrative Procedure Act. *Ickes v. Virginia Colorado Development Corp.*, 295 U.S. 639, 55 S.Ct. 888, 79 L.Ed. 1627 (1935); *Wilbur v. U.S. ex rel Krushnic*, 280 U.S. 306, 50 S.Ct. 103, 74 L.Ed. 445 (1930); *State of Washington v. Udall*, 417 F.2d 1310, 9th Cir. (1969);[3] *Heffelman v. Udall*, 338 F.2d 109, 10th Cir. (1967); *Coleman v. United States*, 363 F.2d 190, 9th Cir. (1966); *Ferry v. Udall*, 336 F.2d 706, 9th Cir. (1964), cert.denied 381 U.S. 104, 85 S.Ct. 1449, 14 L.Ed.2d 186; *Adams v. Witmer*, 271 F.2d 29, 9th Cir. (1958); *Southwestern Petroleum Corporation v. Udall*, 361 F.2d 650, 10th Cir. (1966); *Finch v. U.S.*, 387 F.2d 13, 10th Cir. (1966), cert. denied 390 U.S. 1012, 88 S.Ct. 1262, 20 L.Ed.2d 162; *Texaco, Inc. v. Hickel*, ____ F.2d ___C.A.D.C., Case No. 23097 decided August 19, 1970; *West Coast Exploration Company v. McKay*, 213 F.2d 582 C.A.D.C. (1954). Cert. denied 347 U.S. 989, 74 S.Ct. 850, 98 L.Ed. 1123 (1954).

The Ninth Circuit discussed the applicability of the Administrative Procedure Act to decisions of the Secretary of the Interior in *Converse v. Udall*, 399 F.2d 616, 9th Cir. (1968); cert. denied 393 U.S. 1025, 89 S.Ct. 635, 21 L.Ed.2d 569. There, it said:

> "However, we have held that the Administrative Procedure Act does apply, *Adams*

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[3] The fifth Circuit withheld its decision in the case pending disposition of certiorari in the *State of Washington* case. The Courts's letter is attached as Appendix 1. In its decision. The Fifth Circuit, at footnote 1, specifically noted the contrary decision of the Ninth Circuit in the *State of Washington* case.

> v. *Wimer*, 9 Cir., 1958, 271 F.2d 29, 32-33; *Coleman* v. *United States*, *supra*, 363 F.2d at 194. The portion of our decision in *Coleman* dealing with the Administrative Procedure Act was not questioned by the Supreme Court. See also *Foster* v. *Seaton*, 1959, 106 U.S. App. D.C. 253, 271 F.2d 836, cited with apparent approval in *West* v. *Humboldt Placer Mining Co.* 1963, 371 U.S. 334, 338 n.7, 83 S.Ct. 379, 9L.Ed.2d 350. Cf. *Chouinos* v. *United States*, 10 Cir., 1964, 335 F.2d 918."

There is, therefore, a clear conflict between the Fifth Circuit holding in this case and determinations by other circuit courts concerning the right to judicial review pursuant to Section 701 of the Administrative Procedure Act (5 USC Sect. 701) of decisions of the Secretary of the Interior in connection with the disposition of applications in connection with his administration of the public land laws.

Colson presented to this Court the question as to whether a decision of the Secretary of the Interior acting in his capacity of administering the Federal Land Laws and processing applications in connection therewith, is immune from judicial review as was determined by the Fifth Circuit. It would seem that there is no question that actions of the Secretary of the Interior are no more immune from judicial review than any other administrative agency or department acting in an administrative capacity.

Yet the lower Court and the Fifth Circuit are now free to discard this established principle of law, at least insofar as the Secretary of the Interior is concerned. This would appear to be grossly out of step with the present day concept of justice and due process for it means that a citizen can be deprived of due process through the

arbitrary decision of an administrative officer and the unrestricted application of the Doctrine of Sovereign Immunity. Such a concept was flatly rejected by the D.C. Circuit in *West Coast Exploration Co. v. McKay*, 213 F.2d 582, 596, C.A.D.C. (1954). There it was argued that the Doctrine of Sovereign Immunity precluded review of a decision of the Secretary of the Interior under the rule of *Larson v. Domestic and Foreign Commerce Corporation*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1928 (1949). The Court stated:

> "Such a Denial of Recourse to the courts would be abhorrent to the justice according to law contemplated by the Constitution. The due process clause of the Fifth Amendment endows the United States courts with power, even though there is no statutory provision for direct review of the action of a public officer, to protect against arbitrary action by such an officer."

Recognition of such rights as being those protectable by the due process provisions of the Administrative Procedure Act authorizing judicial review of an agency action by the Secretary of the Interior was specifically recognized by the Ninth Circuit. In *Coleman v. United States*, 363 F.2d 190, 9th Cir. (1966),[4] where the Doctrine of Sovereign Immunity was invoked by the Secretary to block review of his decision. With respect to

---

[4] Reversed on other grounds, 390 U.S. 599, 88 S.Ct. 1327, 30 L.Ed. 2d 170 (1968), without effect on the portion of the *Coleman* decision dealing with the Administrative Procedure Act which was not questioned by the Supreme Court. See *Converse v. Udall*, 9th Cir. (1968) 399 F.2d 616, Cert. Den. 393 U.S. 1025, 89 S.Ct. 635, 21 L.Ed.2d 569 (1969).

the parties right to obtain judicial review of the Secretary's denial of the party's rights, the Court said:

> "... it is not a right which the Secretary of the Interior may, in his discretion, ignore or which he may reject 'in the absence of fraud or imposition'. This is precisely the kind of right which the Administrative Procedure Act, with its provisions for judicial review, was designed to safeguard from arbitrary, capricious, and illegal deprivation by action of executive and administrative agencies. *Adams* v. *Witmer* 9 C.C.A. 1959, 271 F.2d 29." (P.196)

Therefore, the denial of access to the courts in order to obtain judicial review is a denial of due process and in conflict with the decisions of this Court as well as with decisions in the Ninth and Tenth Circuits and the District of Columbia Circuit.

The Issue, As Framed By The Solicitor, was Grossly Misleading

Perhaps the difficulty in this case is the fact that the Solicitor General chose to distort the issue.[5] The question presented, according to the Solicitor was:

> "Whether a suit to *compel the Secretary of the Interior to issue a patent to particular public lands* of the United States is an unconsented suit against the United States

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[5] In addition, the Solicitor's brief at page 6 improperly argued the merits of the case below which are the very matters as to which Petitioner has been denied review. The Solicitor's arguments are not supported by the law and this would have been shown had judicial review been permitted.

> when the Secretary, in rejecting the claim, was acting within the the valid delegation of a constitutional Statute." (Emphasis supplied)

The Solicitor knows full well that the issue never involved compelling the Secretary to issue any patents whatsoever much less compel him to issue patents to particular public lands. Indeed, the parties have stipulated throughout this case that Section 7 of the Taylor Grazing Act (43 USC 315(f)) is applicable and that its requirements would have to be met by the Secretary *prior* to the issuance of any patent. Section 7 gives the Secretary discretion as to how lands should be classified and that action is a pre-requisite to the issuance of patents in response to applications. Therefore the action here never involved the issuance of patents by the Secretary simply because he never reached the position of even considering the issuance of patents, a fact that it made clear by his own decision. He said:

> "In view of the fact that Colson has not established his right to locate public lands under the certificates, it becomes unnecessary to consider the Director's additional holding or Colson's arguments that certain of the lands which he applied to select are available for selection in satisfaction of the outstanding scrip rights." (Petitioners Brief Appendix G-15)

The Secretary's decision involved the rejection of a threshold application on an arbitrary interpretation as to the *legal* rights contained in Petioners documents that finds no support in statutory or case law. In fact, the Secretary's decision was contrary to the decision of this Court (Midway v. Eaton, 183 U.S. 602, 22 S.Ct. 261, 43 L.Ed. 347 (1902), as well as a decision of the Department of the Interior on the very point in question (Kean, Interior Decision D-29200, April 29, 1914).

Nevertheless the lower Court held, with no elaboration whatsoever, that "this action is a suit against the United States, which is not a party and has not waived its sovereign immunity."[6] The Fifth Circuit held that "prior decisions of this Court, relying upon decisions of the Supreme Court, *require* us to hold that this was, in fact, a suit against the United States, to which it had not given its consent." (Emphasis supplied). But none of the decisions cited by the Fifth Circuit involved an administrative proceeding and no Fifth Circuit decisions and certainly no decisions of the Supreme Court "require" a holding that the action was a suit against the United States and therefore, precluded by the Doctrine of Sovereign Immunity. Indeed, such a determination is inconceivable in light of this Court's consistent position with respect to the right of a citizen to obtain judicial review of an arbitrary decision by an administrative agency.

The most recent case that made this abundantly clear was handed down by this Court on March 2, 1971. *Citizens To Preserve Overton Park, Inc., et al., v. Volpe, Secretary Department of Transportation, et al.*, (Case No. 1066). There, a group of private citizens as well as conservation organizations argued that the Secretary had violated the Department of Transportation Act and the Federal Aid to Highways Act in authorizing construction of an interstate highway through a public park in Memphis, Tennessee.

This Court stated that the threshold question whether petitioners were entitled to any judicial review "was easily answered" pointing out that Section 701

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[6] The same lower Court had earlier *rejected* the defense of sovereign immunity in denying the Secretary's Motion to Dismiss which was argued in Court *on the very same facts.*

of the Administrative Procedure Act provides that the action of each authority of the United States is subject to judicial review except where there is a statutory prohibition of review or where agency action is committed to agency discretion by law. In the *Overton* case, (as in this one) there was no indication whatsoever that Congress sought to prohibit judicial review nor was there any evidence of legislative intent to restrict access to judicial review. With respect to the question of discretionary action, this Court pointed out that it is a very narrow exception and is applicable only in those rare cases where statutes are drawn in such broad terms that in a given case there is no law to apply. Such is not the case here.

Thus, with these guidelines in mind and with the prior decisions of this Court in the cases of *Abbott Laboratories v. Gardner*, 387 U.S. 136 87 S.Ct. 1507, 18 L.Ed. 2d 681 (1967) and *Brownell v. We Shung*, 352 U.S. 180, 77 S.Ct. 252, 1 L.Ed. 2d, 225 (1956) there should be no question that Colson is, in fact, entitled to judicial review.

This Court should not allow to stand the position taken by the Fifth Circuit that decisions of this Court *require* a holding that a decision of the Secretary of the Interior, (no matter how arbitrary) is not subject to review by the judiciary. The Fifth Circuit decision is wrong. *No* decision of this Court has ever reached such a conclusion.

The denial by this Court of the petition for certiorari results in a denial of due process contrary to Constitutional safeguards and protective legislative statutes such as the Administrative Procedure Act. Further, it perpetuates a clear conflict between the Fifth Circuit and decisions of other circuits as well as decisions of this Court.

Judicial review should not be dependent on the Circuit in which judicial relief is sought. This Court has never tolerated the existence of such a condition. It should not do so now.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, the petitioner prays that the Court grant rehearing of the order of denial, vacate that order, grant the petition, and review the judgment and opinion below.

Respectfully submitted,

BARNEY R. COLSON, ET AL

By /s/ Richard Hildreth
Richard Hildreth

By /s/ James E. Rodgers
James E. Rodgers

MARCH 26, 1971

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

RICHARD HILDRETH
Attorney for Petitioner

Appendix I

Fifth Circuit Notice Withholding Decision Pending Certiorari in *State of Washington v. Udall*, 417 F.2d 1310, 9 Circuit, 1969, and Solicitor General Notice Not To Seek Certiorari Therein

Mr. Richard Hildreth
Attorney at Law
Securities Bldg., 5th Floor
729 Fifteenth St., N. W.
Washington, D. C. 20005

March 26, 1970

Re: No. 26212 *Barney R. Colson, et al, vs. Walter J. Hickel, etc.*

Gentlemen:

At the direction of the court I am writing to advise that the decision in the above referenced case is being withheld pending disposition of certiorari in *State of Washington vs. Udall* 417 F.2d 1310, 9 Cir., 1969.

As soon as a decision is rendered in this court in this case, a copy of the printed opinion will be forwarded to you.

Very truly yours,

Edward W. Wadsworth, Clerk

by Ldia G. Comberrel

LGC:cms

cc: Mr. Edward F. Boardman
Hon. Ramsey Clark
Mr. Herbert Pittle
Mr. Roger P. Marquis
Mr. Shiro Kashiwa